

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
INDUSTRIAL WELFARE COMMISSION

Public Hearing

June 30, 2000  
State capitol, Room 4202  
Sacramento, California

P A R T I C I P A N T S

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Industrial Welfare Commission

BILL DOMBROWSKI, Chair

BARRY BROAD

LESLEE COLEMAN

DOUG BOSCO

HAROLD ROSE

Staff

ANDREW R. BARON, Executive Officer

MARGUERITE STRICKLIN, Legal Counsel

RANDALL BORCHERDING, Legal Counsel

MICHAEL MORENO, Principal Analyst

DONNA SCOTTI, Administrative Analyst

NIKKI VERRETT, Analyst

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1                                    P R O C E E D I N G S

2                                    --o0o--

3                                    (Time noted: 10:18 a.m.)

4                    COMMISSIONER DOMBROWSKI: I'd like to call the  
5 meeting to order, please.

6                    I'd like the record to show that we have all  
7 five commissioners in attendance and move to Item 1,  
8 approval of the minutes for the meeting that was held on  
9 -- where's my date?

10                   MR. BARON: May 26.

11                   COMMISSIONER DOMBROWSKI: May 26th.

12                   COMMISSIONER BROAD: We have to take roll.

13                   COMMISSIONER DOMBROWSKI: I just said the record  
14 will show that we're all here.

15                   COMMISSIONER BROAD: Oh, okay.

16                   COMMISSIONER DOMBROWSKI: Commissioners have  
17 reviewed the minutes. Can I hear a motion for approval?

18                   COMMISSIONER BOSCO: I move we approve the  
19 minutes.

20                   COMMISSIONER DOMBROWSKI: Second?

21                   COMMISSIONER COLEMAN: Second.

22                   COMMISSIONER DOMBROWSKI: All in favor, say  
23 "aye."

24                   (Chorus of "ayes")

1                   COMMISSIONER DOMBROWSKI: I would like to make a  
2 brief comment for the record that there was contention  
3 after the last meeting about the Commission following  
4 proper procedures on some of the items on the agenda,  
5 that the Attorney General's Office reviewed those  
6 procedures and said verbally that we followed the proper  
7 steps and were within our boundaries.

8                   Let's go to Agenda Item Number 2, consideration  
9 of the proposed amendments to Wages 1 through 13 and 15,  
10 from the Interim Wage Order. And I would ask Mr. Baron  
11 to comment on that.

12                  MR. BARON: Basically, what Item 2 is, is other  
13 than the issues in Item 3 that relate particularly to the  
14 healthcare industry, but in those couple of areas that  
15 would be expanded to affect the other orders, basically  
16 all that Item 2 is, is the -- kind of the -- a lot of the  
17 core backbone of what was in AB 60 that we -- if you --  
18 even if you look at the headings on the notice,  
19 "Definitions," "Daily Overtime," "Collective Bargaining  
20 Agreements," "Make-up Time," "Meal Periods," "Minors,"  
21 and "Penalties" are taken -- were taken directly from AB  
22 60 and put into the Interim Wage Order. And now, today,  
23 we're basically going through a process of fanning out  
24 those provisions from the Interim Wage Order into -- so

1 that they will now sit into all of the orders.

2 COMMISSIONER DOMBROWSKI: Okay. I have -- it  
3 doesn't -- I believe there are four people -- I'm not  
4 sure if they want to talk about this item or if they were  
5 related to healthcare -- Barbara Blake, United Nurses  
6 Association; Michael Zackos; Rebecca Motlagh; or Allen  
7 Davenport.

8 MR. DAVENPORT: (Not using microphone)  
9 Healthcare.

10 MR. BARON: They all want health.

11 COMMISSIONER DOMBROWSKI: Healthcare? Okay.

12 COMMISSIONER BROAD: Mr. Chairman, can I just  
13 ask a question --

14 COMMISSIONER DOMBROWSKI: Um-hmm.

15 COMMISSIONER BROAD: -- of Mr. Baron?

16 Under Item 2, there's a reference to two issues  
17 involving the collective bargaining and the meal period  
18 in Order 12. We are -- that is included in what is in  
19 the noticed thing that we are voting on. Is that  
20 correct?

21 MR. BARON: The -- no. The issue on -- you  
22 know, I would suggest that you -- those were items that  
23 were sent out to the commissioners.

24 COMMISSIONER BROAD: Okay.



1           MR. BARON: I would say that you should formally  
2 offer those as amendments.

3           COMMISSIONER BROAD: Okay. I will formally --

4           COMMISSIONER DOMBROWSKI: Can you just read them  
5 into the record?

6           MR. BARON: As to the -- as to the -- in the  
7 "Collective Bargaining" section, basically what we're  
8 doing is, where it makes mention in the notice of  
9 "pertinent collective bargaining subsection," the  
10 amendment would actually delineate the specific  
11 subsections. And so, it would start off by saying,  
12 "Except as provided in subsections" -- and the applicable  
13 subsections as to where they fit in the wage orders  
14 themselves. We have situations where the same language  
15 can be sitting in different subsections. So, it doesn't  
16 -- you have to make allowance for that as we fan it out.

17           So, in the "Collective Bargaining," it would  
18 start out by saying, "Except as provided in Subsection  
19 (C)," which deals with overtime for minors 16 or 17 years  
20 of age; "(D), 'Availability of Place to Eat for Workers  
21 on a Night Shift'; and (G), 'Limit on Work over 72  
22 Hours,' the provisions of this order," meaning that if  
23 you have a collective bargaining agreement, "shall not  
24 apply," and then it continues on.

1                   COMMISSIONER BROAD: The provisions of the  
2 overtime section of the order, right, not all of the  
3 order?

4                   MR. BARON: Right.

5                   COMMISSIONER BROAD: That's the --

6                   MR. BARON: Because it's still --

7                   COMMISSIONER BROAD: Right. Section 3, in most  
8 of the wage orders.

9                   MR. BARON: Right, right. I mean, it's still  
10 going into Section 3 as it's -- as it's put in the  
11 notice.

12                   Then as to the -- as to the meal periods -- and  
13 again, this is apart from -- there's a section on meal  
14 periods in Item 3 relative to the healthcare industry --  
15 but what is basically sitting now is to meal periods in  
16 the -- in the language that's in the notice, is direct  
17 language from AB 60. And the other amendment would say  
18 that -- that "This section, however, shall not apply to  
19 Wage Order 12," which is the motion picture industry, and  
20 that the language in Order 12 which provides for a meal  
21 period after six hours, as opposed to after five hours,  
22 would continue to apply.

23                   COMMISSIONER BROAD: Okay. Mr. Chairman, I  
24 would move those two items. However, I would ask that

1 the record reflect, on the second one dealing with meal  
2 periods in the movie industry, that it show me as  
3 abstaining on that. So, two motions.

4 COMMISSIONER DOMBROWSKI: All right.

5 COMMISSIONER BROAD: The first one and the  
6 second one, with me abstaining on the second one.

7 COMMISSIONER DOMBROWSKI: Okay.

8 COMMISSIONER BROAD: Thank you.

9 COMMISSIONER DOMBROWSKI: Do I need to do a roll  
10 or just -- okay. We have a motion. We have -- all in  
11 favor, say "aye."

12 (Chorus of "ayes")

13 MR. BARON: With an abstention on the second.

14 COMMISSIONER DOMBROWSKI: With an abstention  
15 from Commissioner Broad on the second one.

16 With that said, I need a motion for approval of  
17 the language in Item 2.

18 COMMISSIONER BROAD: So moved.

19 COMMISSIONER ROSE: Second.

20 COMMISSIONER DOMBROWSKI: Second. Let's call  
21 the roll.

22 MR. BARON: Dombrowski.

23 COMMISSIONER DOMBROWSKI: Aye.

24 MR. BARON: Bosco.

1 COMMISSIONER BOSCO: Aye.

2 MR. BARON: Broad.

3 COMMISSIONER BROAD: Aye.

4 MR. BARON: Coleman.

5 COMMISSIONER COLEMAN: Aye.

6 MR. BARON: Rose.

7 COMMISSIONER ROSE: Aye.

8 COMMISSIONER DOMBROWSKI: That item is adopted,  
9 five to zero.

10 Let's go to Item 3, which is the review of the  
11 language adopted at the May 26 public hearing on the  
12 healthcare industry.

13 I would like to point out that we have -- I  
14 believe there are still copies at the desk of an  
15 alternative compromise that the industry and its  
16 participants and labor have reached. I think it  
17 demonstrates very good faith on the part of both sides on  
18 some very difficult issues. It does provide for a  
19 further refinement of the definition of the healthcare  
20 industry and which industry employees are eligible for a  
21 12-hour shift. It addresses the issue of mandatory  
22 overtime after 12 hours and what conditions would dictate  
23 that. It provides for some restrictions in terms of  
24 after 16 hours, and the employee having to -- can only be

1 -- volunteer to work overtime, no mandatory overtime  
2 after 16 hours. And in other areas, it provides for  
3 other disclosures in other items that we -- that we were  
4 addressing.

5 Commissioner Broad, I don't know you want to  
6 make any other comments.

7 COMMISSIONER BROAD: Yes. I'd just like to say  
8 that Chairman Dombrowski and I were present at some of  
9 the negotiations which occurred. It was an example of  
10 how the various interests involved in these issues can  
11 get together and negotiate something that works for  
12 everyone. And I -- it's the way the process should go  
13 forward.

14 So, I support this amended draft of Attachment A  
15 and would urge my fellow commissioners to support it as  
16 well.

17 COMMISSIONER DOMBROWSKI: Commissioner Bosco?

18 COMMISSIONER BOSCO: Mr. Chairman, I also want  
19 to reflect what Commissioner Broad has just said. I  
20 think, if you look back at our last meeting and the  
21 contentiousness that we faced then and see now that  
22 almost all these issues are resolved, I think it is to  
23 the credit of you, Mr. Chairman, and Mr. Broad, and the  
24 representatives from management and organized labor that

1 we can be here today in relative quietude on this matter.

2           Having said that, though, I may disrupt things a  
3 bit because I do want to offer an amendment. I don't  
4 know if the chair wants to entertain it at this time or -  
5 -

6           COMMISSIONER DOMBROWSKI: Yes.

7           COMMISSIONER BOSCO: Okay. And I noted that in  
8 the agreement that had been reached, veterinary care and  
9 veterinary establishments had been left out. I haven't  
10 made a lifetime of animal rights or that type of thing.  
11 I do love pets and I kind of unwittingly stepped into  
12 this issue, thanks to local veterinarians contacting me.  
13 But I do think it's important that those clinics that  
14 want to keep 24-hour emergency service, as many of them  
15 do now in each community, be able to adjust their work  
16 hours accordingly. And although all of us, I think, view  
17 human healthcare issues as perhaps more important, I  
18 don't think we should forget that there are healthcare  
19 needs out there for animals through these veterinary  
20 clinics.

21           And so, I would like to make an amendment to the  
22 draft that we have before us, and that be a new  
23 amendment, Item 1(B)(4), that "licensed veterinarians,  
24 registered veterinary technicians, and registered animal

1 health technicians providing patient care" be included in  
2 the healthcare industry coverage, and furthermore, that  
3 the Statement as to Basis be amended to say that within  
4 the meaning of Business and Professions Code Section 4825  
5 through 4857.

6 COMMISSIONER DOMBROWSKI: Let me just -- I was --  
7 - I was going -- we have people who want to testify, so  
8 before we take the motion -- I wanted to have it on the  
9 table so everybody understands what we're going to be  
10 voting on -- but now let's call up the people to testify.

11 COMMISSIONER BOSCO: Okay. Do we have a second  
12 to that or --

13 COMMISSIONER DOMBROWSKI: Well, we will, I  
14 think.

15 COMMISSIONER BOSCO: Okay.

16 COMMISSIONER DOMBROWSKI: After the testimony,  
17 we'll recognize the motion and then ask for a second.

18 COMMISSIONER BOSCO: Okay.

19 COMMISSIONER DOMBROWSKI: But I felt we should  
20 have that on the table before we --

21 COMMISSIONER BOSCO: All right.

22 COMMISSIONER DOMBROWSKI: Let's see. I'd like  
23 to have Mr. Rankin, Mr. Camp, Mr. Davenport. I believe  
24 you want -- did Mr. Camp want to talk on this issue?

1                   MR. CAMP: (Not using microphone) On Item 7, on  
2 the ski industry.

3                   COMMISSIONER DOMBROWSKI: I'm sorry. I'm sorry.  
4                   Barbara Blake, Mr. Maddy, Michael -- I'm sorry -  
5 - Zackos, Mr. Sponseller, Rebecca Motlagh, Mr. Richard  
6 Holober.

7                   Did I miss anyone?

8                   Go ahead, Mr. Rankin.

9                   MR. RANKIN: Tom Rankin, California Labor  
10 Federation.

11                   We, after many meetings and a lot of time and a  
12 lot of support from a lot of people, have reached an  
13 agreement on the proposal that you have before you. I  
14 would like to just point out -- we support this  
15 agreement, but I would like to point out, because I heard  
16 some moans in the audience when you characterized the  
17 agreement, it does provide for no mandatory overtime  
18 except in cases of emergency.

19                   COMMISSIONER DOMBROWSKI: Oh, I'm sorry. You're  
20 --

21                   MR. RANKIN: And the 16 hours had to do with a  
22 voluntary agreement in the case of an emergency only.

23                   COMMISSIONER DOMBROWSKI: Right.

24                   MR. RANKIN: It also -- so, that was the --



1   that's -- I wanted to make that clear. And it also, in a  
2   concession to the hospitals, does allow for a 13-hour  
3   period of work in certain circumstances where an employee  
4   scheduled to relieve the other employee does not report  
5   for duty and doesn't inform the employer more than two  
6   hours before the employee is scheduled to report. And  
7   this is designed to give a one-hour period to find  
8   someone else to do that work.

9               So, both sides made some concessions here. We  
10   worked hard, and we think this is an agreement that you  
11   should approve.

12              Just one comment on the issue that was just  
13   raised. We really don't believe that animal care falls  
14   within the definition of healthcare.

15              COMMISSIONER DOMBROWSKI: Mr. Davenport?

16              MR. DAVENPORT: Mr. Chairman, Allen Davenport,  
17   with the Service Employees International Union, the  
18   largest union of healthcare workers in California and in  
19   the nation.

20              We're very pleased that Mr. Broad and yourself  
21   were able to bring us together with the management side  
22   of the operation and that we were able to create an  
23   agreement that I think accomplishes our major goals, in  
24   terms of a prohibition on mandatory overtime and in

1 creating fairness in the election process. We didn't  
2 achieve everything that we asked for, but I think we're  
3 satisfied that this is a much improved version over the  
4 current state of affairs. There will be more fairness in  
5 the elections. There will be a prohibition on mandatory  
6 overtime.

7 And we're very grateful to you and Mr. Broad for  
8 the work that you put into doing this.

9 We would also say that animal care is not  
10 healthcare. And while there may be an interest in this  
11 industry in doing this, the appropriate way to do that is  
12 not by calling it healthcare, but by creating a wage  
13 board and going -- and going through the same kind of  
14 exercise that we all went through here, as people in the  
15 healthcare industry. And that's -- that's the course of  
16 action I'd recommend to Mr. Bosco and the people who are  
17 appealing to him.

18 MS. BLAKE: Barbara Blake, United Nurses  
19 Associations of California, AFSCME.

20 We urge the Commission to accept the amendments  
21 as they're written. This took a lot of time, patience,  
22 hard work on everyone's part. And we're pleased, as  
23 Allen said, with the amendments as written, and we would  
24 appreciate approval of this.

1           Thank you.

2           MR. HOLOBER: Richard Holober, California Nurses  
3 Association.

4           And, you know, we respect and appreciate all the  
5 work and effort that went into this; however, we do not  
6 support the language on the mandatory overtime, for  
7 several reasons that, you know, we have tried to  
8 enunciate. First is that this leaves the vast majority  
9 of registered nurses in California without any overtime  
10 protection. Approximately half or more of the registered  
11 nurses are not working alternative 12-hour work shifts.  
12 So while this would appear to provide some protection  
13 after 12 hours to that individual, it provides no  
14 protection to an 8- or 10-hour shift nurse, who still can  
15 be compelled to work 16 or 24 hours, as does sometimes  
16 occur.

17           And the language regarding what would constitute  
18 an emergency will still really remain completely in the  
19 discretion of the hospital administrator. When the  
20 hospital administrator determines that there is an  
21 emergency, there is an emergency. It is not subject to  
22 review by any external or objective source, and there are  
23 no penalties for violation of those declarations of an  
24 emergency.

1           So, given those shortcomings, we respectfully do  
2 not support that language.

3           We also do appreciate, you know, all the work  
4 that was put into this. We recognize that in some of the  
5 election procedures, there are some improvements. But we  
6 do believe that the language regarding mandatory overtime  
7 falls short of protection for our nurses.

8           Thank you.

9           MR. MADDY: Mr. Chairman and members, Don Maddy,  
10 representing the California Healthcare Association.

11           We were also a party to the compromise. We  
12 think this is a good balance between the goals the  
13 Legislature and the Governor had with respect to AB 60  
14 and patient care issues. We brought a lot of patient  
15 care issues to the table.

16           With respect to the mandatory overtime issue, we  
17 wanted to have some triggers in there that would protect  
18 in the case of emergency so patients aren't left without  
19 care. That was the goal of both sides, and I think that  
20 we -- and both sides wanted to make sure patients were  
21 protected as well as having some employees and management  
22 have some flexibility and some -- some way to work out  
23 problems among themselves, as opposed to going to outside  
24 parties and third parties for every single dispute.

1           So I think this is a very good compromise that's  
2   been reached. I think it is very fair with respect to  
3   election procedures, gives some remedies when employers  
4   are not operating properly with respect to the goals of  
5   the legislation. And I think it also is a testament to  
6   where cooperation can take you.

7           Your help, Mr. Chairman, and Mr. Broad's, since  
8   you sat through the meetings, were particularly helpful  
9   to us. This is a -- this was a tough road. It was a  
10   tough road for us to go down. We didn't have -- we  
11   didn't really have a good understanding of each other's  
12   needs at the beginning, and I think at the last meeting  
13   it kind of showed that. There was a lot of  
14   misunderstandings. And I think we reached some  
15   understandings through last month that are going to be  
16   very productive and helpful to all concerned.

17           I also want to thank Mr. Baron for his  
18   participation, because he was a good person to bounce  
19   things off of and to also help communicate between the  
20   sides during this process.

21           So, we support it and we appreciate your help.  
22           Thank you.

23           COMMISSIONER BROAD: Mr. Chairman?

24           COMMISSIONER DOMBROWSKI: Barry.

1                   COMMISSIONER BROAD: Mr. Maddy, I just wanted to  
2 particularly express my appreciation for your role in  
3 this process. You showed tremendous leadership. And as  
4 someone who's a professional advocate myself, I sort of  
5 admire -- I very much admire the way you handled yourself  
6 in this process. Thank you.

7                   MR. MADDY: Thank you very much.

8                   COMMISSIONER DOMBROWSKI: And I'd like to echo  
9 the compliments to the staff and Mr. Baron for the work  
10 they did on this. It was -- it was very, very helpful.

11                   Any other comments?

12                   (No response)

13                   COMMISSIONER DOMBROWSKI: Okay. I believe we  
14 have a motion on the table from Commissioner Bosco. Do  
15 we have a second?

16                   COMMISSIONER COLEMAN: I'll second that.

17                   I've thought about this quite a bit and we have  
18 received, I think, more correspondence on this topic than  
19 just about anything else. But I think the key thing to  
20 keep in mind is the flexibility that this affords not  
21 only, I think, helps the industry, but it is flexibility  
22 for the -- for the workforce to be able to do this. So,  
23 I think this is a human issue, not just an issue about  
24 service to the animals that are being served through the

1 industry.

2 COMMISSIONER DOMBROWSKI: Mr. Broad.

3 COMMISSIONER BROAD: Very quickly, with all due  
4 respect to Mr. Bosco, I feel like the intent of the  
5 Legislature in passing AB 60 was to restore -- or give us  
6 the authority to maintain 12-hour days in the healthcare  
7 industry as they existed prior to the 1998 wage orders.  
8 And I do not believe the veterinary industry was ever  
9 included previously. So just -- everyone should  
10 understand that what we're doing here is expanding  
11 something that was never there prior to 1998.

12 So, I must respectfully vote no on this  
13 particular issue.

14 Thank you.

15 COMMISSIONER DOMBROWSKI: Any other comments?

16 (No response)

17 COMMISSIONER DOMBROWSKI: Okay. Let's call the  
18 roll.

19 MR. BARON: On the amendment, right?

20 COMMISSIONER BROAD: On the amendment.

21 COMMISSIONER DOMBROWSKI: On the amendment.

22 MR. BARON: Dombrowski.

23 COMMISSIONER DOMBROWSKI: Aye.

24 MR. BARON: Bosco.

1 COMMISSIONER BOSCO: Aye.  
2 MR. BARON: Broad.  
3 COMMISSIONER BROAD: No.  
4 MR. BARON: Coleman.  
5 COMMISSIONER COLEMAN: Aye.  
6 MR. BARON: Rose.  
7 COMMISSIONER ROSE: No.  
8 MR. BARON: Three to two.  
9 COMMISSIONER DOMBROWSKI: Yeah. And we need a  
10 motion on the overall --  
11 COMMISSIONER BROAD: I'd like to move the  
12 overall.  
13 COMMISSIONER DOMBROWSKI: Second?  
14 COMMISSIONER ROSE: Second.  
15 COMMISSIONER DOMBROWSKI: Okay. Call the roll.  
16 MR. BARON: Dombrowski.  
17 COMMISSIONER DOMBROWSKI: Aye.  
18 MR. BARON: Bosco.  
19 COMMISSIONER BOSCO: Aye.  
20 MR. BARON: Broad.  
21 COMMISSIONER BROAD: Aye.  
22 MR. BARON: Coleman.  
23 COMMISSIONER COLEMAN: Aye.  
24 MR. BARON: Rose.



1 COMMISSIONER ROSE: Aye.

2 COMMISSIONER DOMBROWSKI: Five to nothing. That  
3 is adopted.

4 Let's go to Item 4. Commissioner Broad has  
5 circulated language concerning meal periods and rest  
6 periods for Orders 1 through 13 and 15. Would you like  
7 to --

8 COMMISSIONER BROAD: Yes, Mr. Chairman. This is  
9 a rather -- a relatively small issue, but I think a  
10 significant one, and that is we received testimony that  
11 despite the fact that employees are entitled to a meal  
12 period or rest period, that there really is no incentive  
13 as we establish it, for example, in overtime or other  
14 areas, for employers to ensure that people are given  
15 their rights to a meal period and rest period. At this  
16 point, if they are not giving a meal period or rest  
17 period, the only remedy is an injunction against the  
18 employer or -- saying they must give them.

19 And what I wanted to do, and I'd to sort of  
20 amend the language that's in there to make it clearer,  
21 that what it would require is that on any day that an  
22 employer does not provide a meal period or rest period in  
23 accordance with our regulations, that it shall pay the  
24 employee one hour -- one additional hour of pay at the

1 employee's regular rate of compensation for each workday  
2 that the meal or rest period is not provided.

3 I believe that this will ensure that people do  
4 get proper meal periods and rest periods. And I would --

5 COMMISSIONER DOMBROWSKI: Let me ask a question.  
6 If you're an employer and you provide for a 30-minute  
7 meal period a day, and your employee misses that meal  
8 period or eats while working through that meal period, I  
9 believe you get paid, correct? It's a paid -- it would  
10 then be a paid meal period.

11 COMMISSIONER BROAD: Yes, it would be a paid  
12 meal period.

13 COMMISSIONER DOMBROWSKI: Right.

14 COMMISSIONER BROAD: I mean, assuming they pay  
15 you for it. I mean --

16 COMMISSIONER DOMBROWSKI: Assuming that -- well,  
17 okay. Does this say, then, if you had a 30-minute meal  
18 period as your standard procedure, you would get -- and  
19 you missed that, you get an hour's worth of pay? Is that  
20 what I'm -- additional -- an hour additional pay.

21 COMMISSIONER BROAD: If your employer did not  
22 let you have your meal period, I think, is what it says.  
23 So it's -- it doesn't involve, you know, waivers of a  
24 meal period or time off or anything of that sort. And

1 rest periods, of course, are somewhat different.

2 Employers are obligated to provide rest periods --

3 COMMISSIONER DOMBROWSKI: Correct.

4 COMMISSIONER BROAD: -- duty-free and must pay  
5 for them. So if you don't provide a rest period, then  
6 the -- you know, the employee gets their day's pay, but  
7 they don't get the rest, and so that's -- with respect to  
8 a meal period, it doesn't have to be compensated.

9 COMMISSIONER DOMBROWSKI: Okay.

10 COMMISSIONER BROAD: So it's particularly  
11 egregious with regard to rest periods.

12 COMMISSIONER DOMBROWSKI: Okay. I don't -- does  
13 anyone wish to testify on this item?

14 MR. RANKIN: Tom Rankin, California Labor  
15 Federation.

16 I would like to express our support for  
17 Commissioner Broad's proposal. As he stated, the problem  
18 exists right now that there is no remedy for a missed  
19 meal period or a missed rest period. And what his  
20 proposal does is provide a remedy.

21 And the purpose of the rest period and the meal  
22 period is, in the case of rest periods, to have a rest  
23 break where an employee is relieved from work duties.  
24 The same is true for meal periods, to provide a break

1 where people can partake of a meal. It is not sufficient  
2 that they -- if they don't get their meal period, they  
3 simply get paid for that half hour. Sure they do;  
4 they're working that half hour. I would hope they would.

5 This provision of Mr. Broad's at least provides  
6 a minor disincentive for employers not to deny employees  
7 their rights to rest and meal breaks.

8 MS. BROYLES: Good morning, commissioners.  
9 Julianne Broyles, from the California Chamber of  
10 Commerce.

11 We had not been apprised, of course, of this  
12 particular provision early on. Otherwise we probably  
13 would have had more extensive comments on it.

14 I guess I would have to, first of all, raise the  
15 issue of the authority to establish a new crime, which  
16 basically this is doing. Additionally, we would also  
17 point out that if the employee has missed a meal period,  
18 they are going to be paid for the meal period in almost  
19 all instances. In terms of setting up a new penalty and  
20 a crime for basically missing a rest period, as far as I  
21 know there is no statute that would permit that to be  
22 done. And we would oppose this particular amendment.

23 MR. ABRAMS: Thank you, Mr. Chairman, members of  
24 the Commission. My name is Jim Abrams. I'm with the

1 California Hotel and Motel Association.

2 And two issues: first of all, we also question  
3 the legislative authority of the Commission to, in  
4 essence, adopt and impose new penalties with respect to  
5 violations of what is, in essence, a statute, and then  
6 the statute picking up the regulations of the Industrial  
7 Welfare Commission. So, we object to and question the  
8 authority of the IWC to adopt this particular provision.

9 If, however -- and not conceding the point --  
10 if, however, this type of language is adopted, I have  
11 several questions.

12 First of all, Commissioner Broad, is it your  
13 intent that the hour of pay that you reference here would  
14 be treated as an hour worked for purposes of calculating  
15 daily or weekly overtime?

16 COMMISSIONER BROAD: No.

17 MR. ABRAMS: I think -- and again, not conceding  
18 that the Commission has any authority to adopt any such  
19 provision as this, but if you decide to do so, I would  
20 suggest to you that you need to make that clear.

21 Secondly, I -- I'm not sure I understood your  
22 comments with regard to on-duty -- agreed upon on-duty  
23 meal periods. I -- I think, in reading the language  
24 here, my understanding was that it was intended that an

1 agreed upon on-duty meal period, for which the employee  
2 is, in fact, paid for the half hour that he or she is  
3 working, in essence, does not enter into this equation at  
4 all. But you made a comment a moment ago that quite --  
5 with all due respect, confused me. I just want to  
6 clarify that.

7 COMMISSIONER BROAD: The employer who, under our  
8 regulations, lawfully establishes an on-duty meal period  
9 would not be affected if the employee then takes the on-  
10 duty meal period. This is an employer who says, "You do  
11 not get lunch today, you do not get your rest break, you  
12 must work now." That is -- that is the intent.

13 Let me respond, if I may. Clearly, I don't  
14 intend this to be an hour counted towards hours worked  
15 any more than the overtime penalty. And, of course, the  
16 courts have long construed overtime as a penalty, in  
17 effect, on employers for working people more than full --  
18 you know, that is how it's been construed, as more than  
19 the -- the daily normal workday. It is viewed as a  
20 penalty and a disincentive in order to encourage  
21 employers not to. So, it is in the same authority that  
22 we provide overtime pay that we provide this extra hour  
23 of pay. And that --

24 So, now, with regard to creating a new crime, I

1   guess you could argue that anything we do that changes  
2   something creates a new crime to the extent that things -  
3   - that there are certain aspects of our wage orders that,  
4   if violated, can be prosecuted criminally. But I don't  
5   believe we have the authority to establish a new crime in  
6   the sense that we could say if you -- if you deny someone  
7   their meal period or rest period, that you shall spend  
8   six months in jail or a year in jail or it will be a  
9   felony and so forth. No, we cannot establish new crimes.  
10   The Legislature, however, can establish crimes for  
11   violations of our wage orders, which is their  
12   prerogative, not ours.

13               MR. ABRAMS: Understood. I -- and on that note,  
14   I would -- we -- the California Hotel and Motel  
15   Association objects to the proposal on the ground that  
16   the -- we submit the Commission does not have the legal  
17   authority to adopt such a penalty, also on the ground  
18   that if -- to any extent that an employer is required to  
19   pay this one hour of pay for a meal period missed, that  
20   that has to be offset against whatever penalties the  
21   Legislature has established for violation of the  
22   Commission's wage orders. Otherwise you are basically  
23   saying to an employer, "You are going to be punished  
24   twice."

1           So we object to the proposed amendment.

2           MS. BROYLES: Mr. Commissioner, can I make one  
3 final point?

4           If this is something that the Commission would  
5 like to move forward on and put over -- or at least put  
6 out notice so --

7           COMMISSIONER DOMBROWSKI: It was noticed. It  
8 was in the notice.

9           COMMISSIONER BROAD: It has been in our notice  
10 for a month. I mean, we did --

11          MS. BROYLES: In terms of the full penalty, the  
12 hour penalty?

13          COMMISSIONER BROAD: No. The language that's  
14 proposed to be adopted has been out there. I think --

15          MS. BROYLES: Right.

16          COMMISSIONER BROAD: -- you may agree with that  
17 substantively --

18          MS. BROYLES: The amendment of Mr. -- of  
19 Commissioner Broad.

20          COMMISSIONER BROAD: -- but there's no last-  
21 minute aspect to this at all.

22          MS. KAHN: Spike Kahn, AFSCME Council 57.

23          I represent quite a few workers in the hospital  
24 industry at UCSF that -- just in policy, the clinics are



1 always understaffed and they just never have enough  
2 staffing to let that person come out on a break. It's  
3 not every day, it just happens that people, because the  
4 clinics are full, the patients are coming, you have to  
5 keep the flow going because you don't want your patients  
6 to be waiting while you go out. And day after day,  
7 people don't get a break.

8           And I would like to support this amendment and  
9 explain that, by having it on the books, it would give us  
10 quite a bit of incentive to our employers that they would  
11 just start following the contracts and following the laws  
12 that are already down there, that you have to have a  
13 break, just by having it on the books. I don't think it  
14 would come up that often, in the same way that they don't  
15 usually violate any of the -- the overtime laws. It's  
16 just a matter of they would be encouraged much more to  
17 not keep on working us through our breaks and our lunch  
18 times if it were there.

19           So we're in support of that.

20           COMMISSIONER DOMBROWSKI: Thank you.

21           Ms. Stricklin, regarding the legal question?

22           MS. STRICKLIN: You were asking whether there  
23 was any legal impediment to such a penalty. And 516 of  
24 the Labor Code allows the Commission to adopt or amend

1 working condition orders with respect to break periods,  
2 meal periods, and days of rest.

3 And then again, if you look at Section 558, the  
4 last section says that civil penalties provided in 558  
5 are in addition to any other civil or criminal penalty  
6 provided by law, so that a regulation which sets forth a  
7 penalty would just be an additional penalty, which the  
8 IWC has the power to do.

9 COMMISSIONER DOMBROWSKI: Any other questions  
10 from the commissioners?

11 (No response)

12 COMMISSIONER DOMBROWSKI: Okay. Commissioner  
13 Broad, I believe you want to make a motion?

14 COMMISSIONER BROAD: Yeah. I'll move it.

15 COMMISSIONER DOMBROWSKI: Is there a second?

16 COMMISSIONER ROSE: Second.

17 COMMISSIONER DOMBROWSKI: Okay. Call the roll.

18 MR. BARON: Dombrowski.

19 COMMISSIONER DOMBROWSKI: No.

20 MR. BARON: Bosco.

21 COMMISSIONER BOSCO: Aye.

22 MR. BARON: Broad.

23 COMMISSIONER BROAD: Aye.

24 MR. BARON: Coleman.

1 COMMISSIONER COLEMAN: No.

2 MR. BARON: Rose.

3 COMMISSIONER ROSE: Aye.

4 MR. BARON: Three to two.

5 (Applause)

6 COMMISSIONER DOMBROWSKI: Okay. I'd like to  
7 move to Item 5, consideration of --

8 COMMISSIONER BOSCO: How about a round of  
9 applause for the veterinary?

10 COMMISSIONER BROAD: Take care of the dogs and  
11 cats right now.

12 (Laughter)

13 COMMISSIONER DOMBROWSKI: Here we are, moving  
14 along so well.

15 Item 5, consideration of amendment to Wage Order  
16 5 concerning personal attendants.

17 I'd ask Mr. Baron to brief us.

18 MR. BARON: This is an overall issue that has  
19 been discussed previously. The background to this is  
20 that there had been language in the earlier version of  
21 the wage orders, in 5-93, that, when we went -- going  
22 back to that -- had been changed in '98, but then when we  
23 went back to, now, the earlier versions, referenced a 54-  
24 hour workday (sic) for these categories of employees.

1 That violates the federal regs, the Fair Labor Standards  
2 Act.

3 So, what has been done here is basically reduce  
4 that 54 hours to the 40 hours and otherwise keeps in the  
5 -- otherwise keeps the exemptions in place.

6 COMMISSIONER DOMBROWSKI: Okay. Any questions  
7 from the commissioners?

8 COMMISSIONER BROAD: Mr. Chairman, I have a --  
9 there is in my mind, you know, a policy issue about these  
10 40-hour-per-week -- whether these people should be  
11 covered by daily overtime. However, we received no  
12 testimony opposing these exemptions as they existed in  
13 the prior wage order, and I think AB 60 clearly permits  
14 the Commission to retain exemptions that were in effect  
15 prior to 1998. And that is what is occurring here.

16 If employees affected -- in these affected  
17 occupations are aggrieved by these conditions, then they  
18 should, I think, come forward to the Commission and  
19 petition the Commission to change the rules. But at this  
20 point, I am supportive of this particular issue, and I  
21 would move it, the amended -- right -- that's in our  
22 packet.

23 COMMISSIONER BOSCO: Second.

24 COMMISSIONER DOMBROWSKI: I want to ask if

1   there's any public testimony.

2                   (No response)

3                   COMMISSIONER DOMBROWSKI:   Okay.   A motion's been  
4   made, and I hear a second.   Can we call the roll for the  
5   adoption of the amended version?

6                   MR. BARON:   Dombrowski.

7                   COMMISSIONER DOMBROWSKI:   Aye.

8                   MR. BARON:   Bosco.

9                   COMMISSIONER BOSCO:   Aye.

10                  MR. BARON:   Broad.

11                  COMMISSIONER BROAD:   Aye.

12                  MR. BARON:   Coleman.

13                  COMMISSIONER COLEMAN:   Aye.

14                  MR. BARON:   Rose.

15                  COMMISSIONER ROSE:   Aye.

16                  COMMISSIONER DOMBROWSKI:   That measure is  
17   adopted, five to nothing.

18                  Okay.   Item Number 6 is, pursuant to Labor Code  
19   517(b), consideration of language proposed by  
20   Commissioner Broad regarding the commercial fishing  
21   industry.   Yeah, there are certain amendments.   They're  
22   in your packet.

23                  And I'd ask Commissioner Broad to give us an  
24   overview.

1           COMMISSIONER BROAD: Mr. Chairman and members, I  
2 met extensively and had discussions extensively with  
3 representatives of both sectors of the commercial fishing  
4 industry. And let me explain for your benefit and  
5 others, we're dealing with two industries here. One is  
6 the commercial sportfishing industry, known colloquially  
7 as party boats, in which people go out and fish from a  
8 boat for the day. That is essentially a part of the  
9 amusement and recreation industry, Order 10. Then there  
10 is commercial fishing in the sense of harvesting fish for  
11 sale, what we generally view as commercial fishing, which  
12 is Order -- would be under Order 14.

13           With respect to Order 10, the commercial  
14 sportfishing industry representatives met with me and  
15 requested that we create a formula which would allow them  
16 to continue the bookkeeping system that they do now with  
17 regard to paying their crew, which is essentially divided  
18 into half-day trips, three-quarter-day trips, full-day  
19 trips, and overnight trips. And what this would permit  
20 them to do would be to pay them for a one-half-day trip.  
21 It was noticed as five hours; they came back and wanted  
22 to make it six hours. They would pay them six times the  
23 minimum wage for a half-day trip, and ten times the  
24 minimum wage for a three-quarter-day trip, twelve times

1 the minimum wage for a full-day trip, or -- and then  
2 there would be a requirement for an overnight trip.

3 This is an option for them. It is not mandated  
4 upon them. And it does not eliminate their minimum wage  
5 obligation. That is to say they have to pay minimum wage  
6 for all hours worked. So, in some circumstances, as the  
7 industry representatives explained to me, they would --  
8 you know, a half-day trip may come back a little sooner,  
9 and for bookkeeping reasons, they're going to pay someone  
10 a flat rate for that day.

11 With respect to both industries, we will  
12 continue this -- if adopted -- will continue the overtime  
13 exemption that was in the Labor Code and was repealed,  
14 but we were given the authority to continue it. We  
15 received no testimony opposing that, and there are --  
16 traditionally, both sectors have been exempt from  
17 overtime because of the particular nature of the industry  
18 -- you know, they're chasing fish, basically, and they  
19 never know whether they're there or not there.

20 And there's also language attached with regard  
21 to the Statement of the Basis.

22 And then, also, the other change is that with  
23 respect to the commercial sportfishing industry, there is  
24 the -- representatives met with me and indicated that on

1 an overnight trip, that a crew member would receive no  
2 less than 8 hours off-duty time during a 24-hour period.  
3 With that, I --

4 COMMISSIONER DOMBROWSKI: Okay. We have not  
5 received any cards and testimony. Does anyone wish to  
6 testify on it?

7 (No response)

8 COMMISSIONER DOMBROWSKI: Any questions from the  
9 commissioners?

10 (No response)

11 COMMISSIONER DOMBROWSKI: I'd ask for a motion.

12 COMMISSIONER ROSE: So moved.

13 COMMISSIONER DOMBROWSKI: Second?

14 COMMISSIONER BOSCO: Second.

15 COMMISSIONER DOMBROWSKI: Call the roll.

16 MR. BARON: Dombrowski.

17 COMMISSIONER DOMBROWSKI: Aye.

18 MR. BARON: Bosco.

19 COMMISSIONER BOSCO: Aye.

20 MR. BARON: Broad.

21 COMMISSIONER BROAD: Aye.

22 MR. BARON: Coleman.

23 COMMISSIONER COLEMAN: Aye.

24 MR. BARON: Rose.



1 COMMISSIONER ROSE: Aye.

2 MR. BARON: Five to nothing.

3 COMMISSIONER DOMBROWSKI: All right. Item  
4 Number 7 is consideration of the proposed language that I  
5 circulated with the notice of the meeting, regarding the  
6 ski industry. I'd like to keep this to ten minutes on  
7 both sides, if we can.

8 COMMISSIONER BOSCO: Can I ask what you're  
9 referring to?

10 MR. BARON: It's Item 7 in your notice.

11 COMMISSIONER DOMBROWSKI: In your notice.

12 COMMISSIONER BROAD: It's in the notice. It's  
13 not in the tab.

14 MR. BARON: It's in the notice itself.

15 COMMISSIONER DOMBROWSKI: It's the proposal that  
16 the industry goes to a 48-hour week, 10-hour day, during  
17 the season.

18 Mr. Camp, Pamela Mitchell, Bob Roberts, Patty  
19 Gates, and Marcie Berman, and Mr. Rankin.

20 MR. RANKIN: Tom Rankin, California Labor  
21 Federation.

22 COMMISSIONER DOMBROWSKI: Excuse me, Tom.

23 A point of order. If you haven't signed a card  
24 for the specific item, we need you to, just for our

1 record-keeping, to take one of the cards on the table and  
2 fill it out, that you testified on that issue.

3 Okay.

4 I think, Tom, I need you to have it filled out.

5 MR. RANKIN: Yeah. I think I did, maybe a  
6 little late, but I have.

7 COMMISSIONER DOMBROWSKI: All right.

8 MR. RANKIN: We oppose this proposal. What we  
9 currently have in the ski industry, which is about to  
10 expire on the 1st of July, is the ability to work  
11 employees 54 hours a week without overtime. You held a  
12 hearing on this issue down in Los Angeles. I know a  
13 couple of commissioners, unfortunately, were not able to  
14 be at that hearing, so we want to say some of the things  
15 that you -- some of you have already heard.

16 But we don't find any justification for treating  
17 the ski industry differently from any other industry  
18 which is subject to the 8-hour day and subject to  
19 alternative workweeks, given a vote of the employees in  
20 that industry.

21 The other states, I might point out, the two  
22 other states that do have daily overtime, Nevada and  
23 Alaska, which have skiing, both of them, happen to cover  
24 their employees with daily overtime. They don't have an

1 exception for the ski industry. Canada, which is a  
2 competitor for skiers and business in that industry, the  
3 three provinces of British Columbia, Alberta, and  
4 Manitoba all have daily overtime and do not exempt the  
5 ski industry. We find no good reason for exempting the  
6 ski industry in the wage order of the future.

7           And we have Pam Mitchell, who's a worker in the  
8 ski industry at Mammoth Mountain, who has testified  
9 before you in Los Angeles, and she can best speak to the  
10 conditions in this industry. It would be, I think you'll  
11 find, prejudicial to the health of the workers -- health  
12 and safety and -- and general good working conditions of  
13 the workers in this industry to subject them to a 48-hour  
14 week and a 10-hour day without a vote, without a vote.  
15 And you should know that the intent of AB 60 clearly was  
16 to provide employees with a choice of alternative  
17 workweeks. And your proposal does not allow them to make  
18 that choice.

19           Pam Mitchell.

20           MS. MITCHELL: My name is Pam Mitchell, and I'm  
21 a Mammoth Mountain ski area employee. I've worked in  
22 three departments at Mammoth Mountain ski area on and off  
23 during the last nine years. I've worked in  
24 transportation, housekeeping, and retail sports shop.

1           I am speaking representing approximately 200  
2 employees in support of 40 hours a week and in support of  
3 8 hours a day, unless there is an employee vote for four  
4 10's.

5           People who work at the ski resort need and  
6 deserve the same protection as other California  
7 employees. The state law established by AB 60  
8 establishes this basic 8-hour standard.

9           The owners of ski resorts, including who owns  
10 the ski resort that I work for, whether they're huge  
11 corporations or whether they're a family-owned business,  
12 can operate successfully without denying employees  
13 overtime pay. Denying overtime pay is, in effect, a  
14 subsidy from their employees. And that's really what  
15 these exemptions are all about, allowing employers to  
16 unreasonably demand from workers overtime work without  
17 overtime pay.

18           This proposed exemption, it mentions snow-making  
19 and grooming activities, but, in effect, this will deny  
20 overtime to anyone working for a ski resort and the  
21 businesses that the ski resort owns, because included in  
22 this, the way it has been going on now and the way it  
23 will continue to go in, and with this wording, "together  
24 with all operations and facilities related thereto,"

1   there are not just -- this does not simply apply to lift  
2   operators and ski instructors, ski patrol, people working  
3   during -- specifically related to skiing. This also goes  
4   to people working in housekeeping and people working as  
5   clerks, people working as hotel and restaurant employees,  
6   construction workers who are building at the time that  
7   the ski resort's exemption is in effect. This applies to  
8   a couple thousand people.

9                   And the intent of this overtime bill is to  
10   ensure that workers are not exploited. This is  
11   particularly necessary in the ski industry and other  
12   industries where there is no union representation, and  
13   there has basically been no representation at all.

14                  I can assure you that when the ski industry had  
15   the 56-hour workweek, they worked us at least 56 hours a  
16   week. And if you let them work us 48 hours a week  
17   without -- and they can do any variations of this 48-hour  
18   week -- they will work us 48 hours a week. Very few will  
19   understand that this is wrong, and most people --

20                  COMMISSIONER DOMBROWSKI: I'm going to enforce  
21   the time period.

22                  MS. MITCHELL: Thank you very much.

23                  COMMISSIONER DOMBROWSKI: We have four minutes  
24   left here, please.

1                   MR. CAMP: Chairman Dombrowski, my name is Bill  
2 Camp. I'm executive secretary of the Sacramento Labor  
3 Council. Our jurisdiction covers the ski resorts in the  
4 Sierra mountains in California.

5                   These are workers. These are bus drivers, these  
6 are cooks, these are people who work for a living. The  
7 original purpose of passing the Industrial Welfare  
8 Commission was to protect workers from exploitation,  
9 particularly women, particularly children, and now all  
10 workers. We made this a state policy.

11                  And what we have is an industry that's on a  
12 growth, that's benefiting from this gigantic explosion of  
13 wealth at the top of the pyramid. We have people all  
14 over this state now becoming millionaires. They're going  
15 up there and skiing, and they're exploiting these people  
16 who work for wages. This is purely exploitation of wage  
17 workers by people who use an industry that's phenomenally  
18 built around providing a service to the richest people in  
19 this state.

20                  To say to us that those workers --

21                  (Applause)

22                  COMMISSIONER DOMBROWSKI: Sergeant? Sergeant, I  
23 want it noticed that if we continue to have outbursts, we  
24 are going to clear it.

1           Go ahead, Mr. Camp.

2           MR. CAMP: Mr. Chairman, we're asking that this  
3 board vote against this exception, that these workers are  
4 working people in this state, just like everybody else.  
5 To exclude them, particularly in an industry which is  
6 dominated by this affluent class and serviced by these --  
7 when we talk about the economy of this state, it is the  
8 rural parts that are left behind the economic growth.  
9 It's because we create laws that suppress the wages in  
10 those rural economies. To say to those counties, those  
11 mountain counties in this state, "We're going to lower  
12 your wage standard," is contrary to what this Governor  
13 and this state believes in, which is this economic growth  
14 should be shared by all. Everybody should participate as  
15 this tide comes in.

16           This rule denies those workers in those counties  
17 the chance to participate in the rising tide of this  
18 economy. It's wrong. We oppose it, and we ask you to  
19 vote no.

20           (Applause)

21           MS. BERMAN: My name is -- am I on?

22           My name is Marcie Berman, and I'm here as a  
23 representative of the California Employment Lawyers  
24 Association. I already spoke at the Van Nuys hearing, so

1 I'll be really brief.

2 I just don't understand how you're going to be  
3 able to write the Statement of Basis to support this.  
4 There's no justification for treating this industry any  
5 different than any other industry. Moreover, in this  
6 particular industry, there was testimony at the Van Nuys  
7 hearing that the companies routinely lay off these  
8 employees during days and weeks when business is bad. So  
9 now they're going to still be able to do that. And yet,  
10 when business is great, and therefore they need people to  
11 work more hours, they're not going to share the up-side  
12 benefit of that great business and pay people the  
13 overtime that's due to all other workers in the state. I  
14 just -- I don't see any justification for making a  
15 distinction between this industry and any other. And I  
16 just -- I cannot envision how you could possibly draft a  
17 Statement of Basis to support this.

18 MS. GATES: My name is Patty Gates, and I'm an  
19 attorney with the law offices of Van Bourg, Weinberg,  
20 Roger and Rosenfeld. Our office represents thousands of  
21 unions and working people in the State of California.

22 And I'm here to testify that while this  
23 Commission has broad powers and broad authority to  
24 investigate the health, the safety, and the welfare of



1 California working people, this Commission's authority is  
2 circumscribed when it comes to adopting any amendments  
3 that change the basic standard of the 8-hour day. Under  
4 Labor Code Section 515, the IWC's authority to exempt  
5 workers from overtime is confined to those circumstances  
6 where you're able to make a finding that that exemption  
7 will forward and benefit the welfare of working people.  
8 I don't think you can make that finding here.

9 COMMISSIONER BROAD: Mr. Chairman, are there any  
10 proponents for this proposal?

11 COMMISSIONER DOMBROWSKI: Yes, and he's coming  
12 up right now.

13 (Laughter)

14 COMMISSIONER DOMBROWSKI: Mr. Roberts.

15 I also would point out, in response to the last  
16 testimony, if you go to AB 60, Section 11, 517, Clause  
17 (b), "Prior to July 1, 2000, the IWC shall" --  
18 -- and I will abbreviate --

19 "shall conduct a review of wages, hours, and  
20 working conditions in the ski industry,  
21 commercial fishing . . . healthcare . . .  
22 stables. Notwithstanding subsection (a) and  
23 Sections 510 and 511, and consistent with its  
24 duty to protect the health . . . and welfare of

1 workers . . . the commission may, based upon . .  
2 . review, convene a public hearing to adopt or  
3 modify regulations."

4 And then, also, in Section 16, the Legislature  
5 in AB 60 did reaffirm the existing ski industry exemption  
6 of 56 hours and says that we -- this will remain in  
7 effect until July 1st, 2000, and as of that date,  
8 repealed unless a later-enacted statute is enacted before  
9 it is extended or if this Commission acts.

10 Mr. Roberts.

11 MR. ROBERTS: Good morning, Mr. Chairman and  
12 members of the Commission. My name is Bob Roberts. I am  
13 the executive director of the California Ski Industry.  
14 And as I have testified on a number of other occasions  
15 and in my communications, I think I can safely stay  
16 within your ten-minute limit.

17 First of all, our industry historically has been  
18 exempted under the Fair Labor Standards recreational --  
19 seasonal recreational exemptions. And that applies to a  
20 number of our competitors. The largest competitors are  
21 not in Nevada and in Alaska. They are in Colorado and in  
22 Utah. And these are states which have exempted, in  
23 different forms, their ski industry. So, this is not an  
24 unusual exemption.

1           And the reason is quite clear. We are heavily  
2 dependent upon weather. This last season is a case in  
3 point. We dropped from about 7 million visits down to  
4 6.5 million because we missed Christmas. It just didn't  
5 happen.

6           The other dimension that is very unique to our  
7 industry and, I think, does set us apart is the fact that  
8 we have our public, five to ten thousand people, showing  
9 up on our doorstep each day. And that's quite different  
10 from a number of other industries. We have a public  
11 safety component.

12           What we have done, and what I have outlined in  
13 my letter to you, is tried to reach what we think is a  
14 compromise that is fair in terms of the economics. We  
15 are not a growing industry. There may be a lot of wealth  
16 in this state, but they seem to find other things besides  
17 skiing to do with their wealth. We have, nationally, a  
18 loss of skier visits. They have been around 50 million;  
19 they're dropping down to about 47, 48 million this past  
20 year. We in California have to compete with not only  
21 other states, other countries, we also have to compete  
22 with other things to do in the winter. We're winter  
23 sports, and so people have tremendous discretion, and  
24 they don't have to come to the mountains. We have lots

1 of infrastructure concerns and issues that we have to  
2 confront here in California that make it even more  
3 difficult. So, our economics are not as they have been  
4 painted, as something glorious and growing. To the  
5 contrary, we are very challenged at this point. We see  
6 small areas on the brink of going under. The larger  
7 areas, hopefully, have a 5 to 10 percent operating return  
8 in a good year. These are the -- these are the simple  
9 facts. This is a small industry.

10 And the fact that really dominates us is the  
11 fact that of our 16,000 employees, 14,500 are seasonal.  
12 And so, the question of having a vote is very difficult  
13 when you know that 14,500 of your employees may or may  
14 not be showing up at the beginning of the season. And we  
15 have a high turnover because so many of them are  
16 students, and they're going back at the end of the  
17 quarter, or if they are even -- we have people who come  
18 from other countries because they simply want to ski.  
19 So, we find ourselves in a situation where we have a core  
20 of very dedicated employees, and we try to deal with  
21 these -- all of our employees fairly. But the  
22 seasonality makes the vote issue very, very difficult and  
23 tenuous to organize for -- on any kind of a basis.

24 These are the -- these are the dimensions. We

1 feel that we have made a very honest compromise, from the  
2 56-hour week that we and our primary competitors enjoy to  
3 something that will fit the operating schedules, will  
4 allow for the public safety, and, at the same time,  
5 provide us with some measure of economic stability. We  
6 cannot pick up our industries and move to another state.  
7 We're here, we intend to stay here, and we'd certainly  
8 like to be -- continue to be the economic engine for our  
9 mountain communities.

10 Thank you very much.

11 COMMISSIONER DOMBROWSKI: Any questions?

12 COMMISSIONER BOSCO: Prior to the reinstatement  
13 of the 8-hour workday, did the ski industry -- or let me  
14 put it a different way. For what period of time did the  
15 ski industry typically have a 54- or 56-hour week?

16 MR. ROBERTS: It really varied, because all the  
17 resorts have varying competitive stances amongst  
18 themselves, particularly at Tahoe. We have some resorts  
19 that had been at a 48-hour week for a number of seasons.  
20 We have others that had not. But really, there was no  
21 uniform -- this is the way it is. I know that Northstar,  
22 for example, had, I think -- I believe, a 48-hour week,  
23 as did Alpine Meadows.

24 COMMISSIONER BOSCO: In what period of time?

1 Are you talking about ten years?

2 MR. ROBERTS: Oh, I'm talking about over the  
3 last four -- four years, four seasons, four or five  
4 seasons.

5 COMMISSIONER BOSCO: If you were to go back ten  
6 years, would it be typical that these ski resorts would  
7 have a 56-, 54-hour week, or would it be a 40-hour week  
8 or somewhere in between?

9 MR. ROBERTS: Well, it would -- it would really  
10 vary, depending upon the weather, because if you really  
11 look at it, our resorts aren't working people the 56  
12 hours maximum. What they're trying to do is literally  
13 make snow while the snow is made available, or work the  
14 snow while it's made available. And that has been the  
15 underlying basis, so that it's hard, if you go back and  
16 you look at the records, to simply demonstrate that,  
17 "Yes, this has been the case." It hasn't been the case.  
18 The work rules have been for 56 hours, but the resorts  
19 have altered the rules, lowered the rules, on those  
20 occasions when we haven't had that much work.

21 COMMISSIONER BOSCO: But, say, ten years ago,  
22 were you able to work someone 54 hours a week without  
23 violating any of the --

24 MR. ROBERTS: Oh, absolutely. No, that's been

1   since the -- since -- we had legislation passed during  
2   the Jerry Brown administration, as I recall, in '84,  
3   exempting our industry specifically -- this was in  
4   statute -- exempting the ski industry from the state  
5   daily overtime requirements.

6               COMMISSIONER BOSCO:   So if we were to adopt a  
7   48-hour week today, it would be less than what you've  
8   enjoyed in the past.

9               MR. ROBERTS:   Oh, absolutely.   And a 10-hour day  
10  -- we had not had a daily requirement.   And what we are  
11  proposing is a 10-hour day because we feel we can fit our  
12  activities within a 10-hour day, for avalanche control  
13  and clean-up and everything we have to do.

14              COMMISSIONER BOSCO:   Now, after a 10-hour day,  
15  as I understand it, you'd have to pay time and a half --

16              MR. ROBERTS:   That's correct.

17              COMMISSIONER BOSCO:   -- under the proposal we  
18  have here.   What about after a 12-hour day?   Would you  
19  still be paying time and a half?   Say if somebody was out  
20  on ski patrol for --

21              MR. ROBERTS:   Yes.   The overtime would kick in  
22  after 10 hours in a day, so --

23              COMMISSIONER BOSCO:   But there would be no limit  
24  to how long it could go at simply time and a half.   Is

1     that true?

2                 MR. ROBERTS:   Well, no.   The next day,  
3     assumably -- I mean, my understanding of the law --

4                 COMMISSIONER BOSCO:   Well --

5                 MR. ROBERTS:   -- is that each day is a 10-hour  
6     limit.   And so --

7                 COMMISSIONER BOSCO:   But if someone worked 14  
8     hours in a day, they would just get 4 hours of time and a  
9     half, with no gradation at all during that time.

10                MR. ROBERTS:   Not under the present language.

11                COMMISSIONER BOSCO:   Thank you.

12                COMMISSIONER BROAD:   Mr. Roberts, do you -- what  
13     I noticed that's missing, leaving aside the 10 hours and  
14     48 hours, is double time after 12, which applies  
15     everywhere else.   Do you have an objection to that?

16                (Laughter)

17                MR. ROBERTS:   Do I have an objection?

18                COMMISSIONER BROAD:   Yes.

19                MR. ROBERTS:   The objection only comes in cases  
20     of storms, because a storm sets in, or a search-and-  
21     rescue operation sets in, these hours -- we have no way  
22     of controlling.   And so, for those -- for those  
23     activities, I think we would have a concern.   For the  
24     other activities and the resort, probably not.



1                   COMMISSIONER BROAD: So, for everything except  
2 related to emergency rescue and that sort of thing?

3                   MR. ROBERTS: Well, no. All of our outdoor  
4 activities. For example, we have to groom all night. We  
5 have -- we have avalanche control, but -- which will  
6 generally start very early in the morning. All of the  
7 outside activities which have to do with -- with the  
8 safety of the slopes and the mountain, maintaining the  
9 mountain safety, because, as your previous people have  
10 testified, they have been concerned about some of the  
11 other occupations. Well, you know, a resort is a large -  
12 - can be a large, integrated kind of operation. But it's  
13 the outside activities that are the primary concern.

14                  COMMISSIONER BROAD: I see. I'd like for you to  
15 focus on the language that says at the bottom -- what  
16 you'd kind of generally call, in this business, the  
17 kicker -- "together with all operations and facilities  
18 related thereto." Does that mean, in your mind, that  
19 everything that is co-owned by the ski facility?

20                  MR. ROBERTS: Not at all. That means those  
21 things that are on the mountain that are a result --

22                  COMMISSIONER BROAD: Okay.

23                  MR. ROBERTS: If they have a lodge, it may be  
24 outside the boundary issue or something, but usually

1 that's a definition between the Forest Service -- our use  
2 permit -- and sometimes the functional operation. But  
3 I'm -- if you're talking about something downtown,  
4 something in some other part of the universe, I don't  
5 think we're asking for that kind of broad reach.

6 COMMISSIONER DOMBROWSKI: The other point Barry  
7 just brought up, that is the -- that language was  
8 actually pulled out of the statute when it was --

9 MR. ROBERTS: Yeah, this language is what was in  
10 the original statute.

11 COMMISSIONER BROAD: Right. But it's repealed  
12 tomorrow, so, you know, that doesn't mean we can't  
13 question it.

14 So, let me -- then let me focus on the actual  
15 situation. We have a hotel that's free-standing, a  
16 resort hotel in a mountain area, 20 yards away from a  
17 hotel on your property. And the employer in that hotel  
18 during the season is obligated to pay daily overtime  
19 after 8, double time after 12, overtime after 40 hours in  
20 a week, a dime and a half after -- in the first 8 hours  
21 of the seventh consecutive day of work. Does that -- and  
22 you don't have to do any of that stuff. Does not that  
23 place those employers, subject to all the same weather  
24 conditions and seasonality and so forth, at a significant

1   disadvantage to your facility, your hotel, which is just  
2   a hotel?

3                   MR. ROBERTS:  No, because they're not operating  
4   the lifts.  They're not providing all of the ancillary  
5   services.

6                   (Audience murmuring)

7                   COMMISSIONER BROAD:  And are there ever people  
8   that stay at your hotels that don't ski?

9                   MR. ROBERTS:  That stay in our hotels that don't  
10  ski?

11                  COMMISSIONER BROAD:  Yeah.

12                  MR. ROBERTS:  I'm sure there are.

13                  COMMISSIONER BROAD:  Do you think those two  
14  hotels, or your restaurant and the other restaurants in  
15  the community, do they compete?

16                  MR. ROBERTS:  They compete, but we have always  
17  had this -- this definition in place, and somehow the  
18  harmony in those mountain communities works, because it's  
19  the attractions of the lifts and slopes that brings  
20  people.  Absent the operation of the ski resort, we would  
21  not have the economic vitality in the community.

22                  COMMISSIONER BROAD:  I guess I can understand --  
23  I don't necessarily agree with it, but I can understand  
24  some argument about employees who are directly and

1 closely related to the actual skiing operation where  
2 weather conditions, you know, dominate everything they  
3 do. I don't quite understand restaurant employees or  
4 janitors or hotel maids or others, who are doing the same  
5 job as people down the street. It's exactly the same  
6 job, and really, their job is unrelated entirely to snow  
7 or emergencies or making snow, or whether it's snowing or  
8 raining or sunny out. And I -- so I have a great deal of  
9 difficulty seeing what -- why we would deny them the  
10 basic protections of overtime that all other workers in  
11 similar jobs in the same communities receive.

12 MR. ROBERTS: Well, first off, very few of the  
13 resorts own their own accommodations. The accommodation  
14 business in the mountains is a particularly risky  
15 enterprise with the shoulder seasons. It's very  
16 difficult to -- if you find the major hotels, the Hyatts  
17 and so on, those are located a long -- fairly far away  
18 from our resorts. The resorts themselves see themselves  
19 in the uphill transportation business.

20 Yes, we provide food service for people at our  
21 base lodges and at our mid-stations, and perhaps the top  
22 of the mountain, depending upon the resort, and we do  
23 have some retail operations and certainly rental  
24 operations that are part and parcel -- and instruction,

1 ski instruction -- to the operation of the resort. But  
2 for the most part, we are not in the hotel business. We  
3 have -- Mammoth has a property. I'm trying to think of  
4 how many really do. Very -- very few actually own their  
5 own hotels. And so, this has not been a major issue or  
6 divisive point in our communities.

7 COMMISSIONER BROAD: So, then, it probably  
8 wouldn't be a major issue for you to eliminate that from  
9 this.

10 (Applause)

11 MR. ROBERTS: What we're trying not to do is to  
12 create two categories of workers within the ski resort.  
13 We don't want to have a dual system. You work for the  
14 resort  
15 -- you work with the resort. We work with -- as not a  
16 tiered kind of tenure. It's a -- one employee.

17 COMMISSIONER BROAD: Well, let me just leave you  
18 with this comment. I think your retention issues, in  
19 terms of employees, would be solved by paying them  
20 overtime.

21 (Applause and cheering)

22 COMMISSIONER DOMBROWSKI: Any other questions?

23 (No response)

24 COMMISSIONER DOMBROWSKI: I'm going to make a

1 motion for adoption of the language as circulated. Do I  
2 have a second?

3 COMMISSIONER COLEMAN: Second.

4 COMMISSIONER DOMBROWSKI: Call the roll.

5 MR. BARON: Dombrowski.

6 COMMISSIONER DOMBROWSKI: Aye.

7 MR. BARON: Bosco.

8 COMMISSIONER BOSCO: Aye.

9 MR. BARON: Broad.

10 COMMISSIONER BROAD: No.

11 MR. BARON: Coleman.

12 COMMISSIONER COLEMAN: Aye.

13 MR. BARON: Rose.

14 COMMISSIONER ROSE: No.

15 MR. BARON: Three to two.

16 COMMISSIONER DOMBROWSKI: Item Number 8,  
17 consideration of the types of executive, administrative,  
18 and professional duties that meet the test of the  
19 exemption.

20 COMMISSIONER BROAD: Mr. Chairman, might it not  
21 be appropriate at this moment, since we're coming up to a  
22 long and contentious issue, to perhaps take a 15-minute  
23 break and then go on?

24 COMMISSIONER DOMBROWSKI: It's fine with me.

1     Okay, we will reconvene at 11:45.

2                     (Thereupon, a short recess was taken.)

3                     COMMISSIONER DOMBROWSKI: I'd like to reconvene  
4     the hearing.

5                     We're on Item Number 8, consideration of the  
6     types of executive, administrative, and professional  
7     duties that meet the test of the exemption. We discussed  
8     this subject a number of times over the last six months.  
9     We've looked at various proposals that I've crafted.  
10    This is related to Section 9 of the bill, 515, where the  
11    bill said,

12                    "The Commission shall conduct a review of  
13                    the duties which meet the test of the exemption,  
14                    and the Commission may, based upon this review,  
15                    convene a public hearing to adopt or modify  
16                    regulation at that hearing pertaining to duties  
17                    which meet the test of the exemption without  
18                    convening wage boards."

19                    We've circulated this morning a duties test for  
20    overtime exemptions that we have -- that I have prepared,  
21    which, in essence, goes to, in my opinion, the actions  
22    that were discussed when that language was inserted into  
23    AB 60. We had a discussion in Senator Burton's office  
24    that we talked about trying to identify when a manager

1 would be doing incidental tasks, that it didn't make him  
2 any less of a manager, and how could we come to some  
3 language clarifying that.

4 I think, if you look at the proposal we have  
5 today, it addresses the concerns that these actions go  
6 around the "primarily engaged." We have tried to make  
7 sure that it's clear that we are recognizing the 50  
8 percent rule. And in essence, what we are trying to get  
9 recognized is that there is a set of federal regulations  
10 which relate to duties that we think should be  
11 consistently applied, not just at the federal level, but  
12 the California level, particularly the issue of the  
13 federal level recognizing that duties that are closely  
14 and directly related to managing should be recognized as  
15 managerial time, and also the federal regulations related  
16 to "closely and directly related," which is occasional  
17 time.

18 I've asked Lynn Thompson and Bruce Young to give  
19 a more specific overview. I'd like to restrict your  
20 comments to fifteen minutes. I would then like to have  
21 the opponents come up -- I believe we have formed a panel  
22 -- Mr. Pulaski, Mr. Rankin -- so we can keep this to some  
23 orderly fashion. They will have fifteen minutes. Then I  
24 would like to open it up for questions from the



1 commissioners for either side. And obviously, those  
2 questions will go as long as commissioners feel it's  
3 necessary. And then we'll proceed from there.

4 COMMISSIONER BROAD: Mr. Chairman, I'd like to  
5 note that I have passed out a modification of your  
6 proposal that, in my opinion, removes the illegal parts  
7 and which I would like to have considered.

8 Also, I think what we should do is probably  
9 question the panelists at the conclusion of their  
10 statements rather than -- otherwise we're going to have  
11 everybody up here at once.

12 COMMISSIONER DOMBROWSKI: I don't mind. I just  
13 don't want the panelists interrupting while they're  
14 presenting the question. I want to be able to --

15 COMMISSIONER BROAD: That's fair.

16 COMMISSIONER DOMBROWSKI: Okay.

17 MR. YOUNG: Mr. Chairman, members, Bruce Young,  
18 on behalf of the California Retailers Association.

19 Let me just briefly give at least an historical  
20 point, from our standpoint. First off, we were one of  
21 only two business organizations that supported AB 60.  
22 There were considerable considerations and concessions  
23 that we made, including doubling -- and putting in the  
24 statute for the first doubling of the minimum salary even

1 to meet the statutory test to be a manager. That was,  
2 again, doubled and codified. And also, there were other  
3 language that was inserted in there that previously had  
4 just been a matter of practice or actions by the  
5 Department of -- DLSE's standards that we now allowed to  
6 be codified.

7 In return, one of the things that we asked for  
8 was the opportunity to try to define the duties of a  
9 manager. We think we've done that in this language.  
10 We've tried to make it as narrow as possible. We tried  
11 to parallel the federal test.

12 But the most important thing is that when we --  
13 when we argued for this language in Senator Burton's  
14 office -- there were four other people besides myself in  
15 the room  
16 -- the one thing that we tried to indicate is we're not  
17 talking about redefining the manager. We put the 50  
18 percent test, for the first time, in the law, that  
19 certainly 50 -- more than 50 percent of their time has to  
20 be spent doing a manager -- being a manager. But  
21 certainly -- and let me use the retail setting as an  
22 example -- in real life, if -- and during a busy time  
23 when we're trying to deal with the public, when there is  
24 a clean-up on Aisle 4 and every -- every member of that

1 store staff is busy trying to service the customer, it is  
2 the manager who -- he or she grabs the broom and goes  
3 down and cleans it up. Or, during a holiday season when  
4 it's busy and the store staff is overwhelmed, it's the  
5 manager who, in that brief occasion, grabs the register  
6 and helps out. It's certainly not an everyday  
7 occurrence, and it's not a matter of regular practice,  
8 but there are the occasions. And when you're dealing  
9 with the public, you deal with ebbs and flows. And in  
10 those ebbs and flows, you have to be able to respond.  
11 And it's those occasional response times that we're  
12 trying to at least allow some consideration for.

13           And as we -- I laid that same example out in  
14 Senator Burton's office, and there was an objection  
15 raised at that time. And Senator Burton thundered back  
16 that when he worked at UPS, the chairman of UPS came down  
17 and worked the delivery line during the holidays. And he  
18 rhetorically said, "Did that make him any less the  
19 chairman of UPS? No, it didn't."

20           And our challenge has been now trying to meet  
21 that narrow -- that narrow test that we felt that, when  
22 we asked Senator Burton for this amendment and it was  
23 inserted in the bill, and that's what we believe, in the  
24 amendments before you, we've tried to do, just deal with

1 those occasional exceptions.

2 And for that, I will turn it over to Lynn now to  
3 at least go through the explanation of what's within our  
4 proposal.

5 MS. THOMPSON: Lynn Thompson, and I'm with the  
6 law firm of Bryan Cave, LLP, and I'm here speaking on  
7 behalf of the California Retailers Association.

8 First of all, I'd like to remind the Commission,  
9 for the record, that the Legislature delegated to the IWC  
10 the responsibility to define the duties that meet the  
11 test of the exemption. I think we all clearly understand  
12 that the statutory rule is that an exempt employee must  
13 spend more than half their time engaged in exempt duties.  
14 But the question that has been delegated to you is what  
15 constitutes exempt duties. And that question exists  
16 under all of the three basic white-collar exemptions, and  
17 that's why you have all three of the exemptions and  
18 proposed language on them in front of you today.

19 Now, this proposal, I can assure you, has been  
20 very carefully drafted and is mindful of the statutory  
21 requirement to be "primarily engaged." But it also  
22 attempts to address several basic objectives. One is for  
23 the IWC to clearly and explicitly state what the elements  
24 of the exemption should be. This is an area where we've

1 had a void in California because the wage orders are so  
2 vague. And we've had the DLSE jumping into the breach to  
3 try to provide some guidance. And frankly, the  
4 interpretations have tended to shift a bit with the winds  
5 of administration and have created some uncertainty for  
6 employers attempting to apply the test in California.

7 Another objective here is to provide, therefore,  
8 some definitive tools and resources that can be consulted  
9 to answer questions about the application of the test,  
10 the duties test. And the way we've chosen to go about  
11 achieving those objectives here is to rely very heavily  
12 on elements of the federal long test. And I laid this  
13 out when I was here a month ago for you, all of the  
14 different elements that exist under the federal long test  
15 that we have incorporated. And many of them have  
16 historically been presumed by the DLSE to be incorporated  
17 historically. But to some extent, there has been a  
18 little cherry-picking and back-and-forth activity on  
19 which parts should be interpreted to be included and  
20 which parts shouldn't. And we think that is what needs  
21 to be clarified.

22 I think it's important to emphasize that we're  
23 not talking about the qualitative test, which is the  
24 federal short test. It is a test for exemption that does

1 not care what you are doing, in terms of the tasks that  
2 you are engaged in, you know, and whether or not they  
3 satisfy -- they are exempt or nonexempt. It does not  
4 require an analysis, a task-by-task analysis. It  
5 requires only an evaluation of what your primary duty is.  
6 And we've tried to be very careful and to be absolutely  
7 clear that we are not attempting to supplant the  
8 California quantitative 50 percent test with a  
9 qualitative requirement. And I think we've accomplished  
10 that in this -- in this regulation.

11 But as I've said, we've attempted to conform it  
12 as closely as possible to the elements of the federal  
13 long test, and then refer to the particular sections of  
14 the regulations under federal law that contain elaborate,  
15 in some cases lots of examples of the application of  
16 these tests. And it's a very helpful resource.

17 The other thing that's helpful, I think, to the  
18 employer community about the way we've laid this out is  
19 that many employers nowadays operate in more states than  
20 just California. Certainly, a lot of the employers that  
21 I work with do. And they face a problem when they come  
22 into California of having to come to grips with  
23 California's unique requirements. It is a lot more --  
24 it's a lot easier for them to understand if they can be

1 dealing with a framework that permits them to satisfy  
2 both the federal test and the California test in the same  
3 analysis. If they can march down the elements of the  
4 analysis and say, "Oh, yeah, okay, we know that one's met  
5 because, you know, we've met it everywhere, we know that  
6 one's met, that one's met. Now we get to this element  
7 which is a California unique element. Now let's look  
8 carefully at that to make sure that the people that we  
9 have here in this state have been properly classified in  
10 light of that element." And, I think, to provide a  
11 framework that is as close as possible, while maintaining  
12 conformity with the 50 percent requirement in California,  
13 is very helpful to compliance-oriented businesses that  
14 are just trying to figure out how they're supposed to  
15 classify people and whether they have to change the way  
16 they're classifying people in California or not.

17 Now, one of the key ways in which I think we've  
18 accomplished the objective that was talked about in  
19 Senator Burton's office was to include a recognition that  
20 exempt work, in all of the three categories, includes  
21 work which is directly and closely related to the  
22 performance of the exempt tasks and responsibilities.  
23 And there are a series of federal regulations that  
24 explore the concept of "directly and closely related" in

1 the context of each of those exemptions. Some of those  
2 federal regulations appear to be non-controversial in the  
3 sense that they are included in both Mr. Broad's  
4 rendition and in our rendition. There are a few elements  
5 that appear to be the subject of controversy, and  
6 presumably the focus of what you're really trying to come  
7 to grips with here this morning.

8           One of them is this issue of occasional tasks,  
9 which you heard mentioned. Now, this is one of a series  
10 of regulations that arises under the executive exemption  
11 only under federal law. And it's only a couple of  
12 paragraphs, and it explains, I think, in ways that are  
13 very -- very limited that what it is talking about is,  
14 quote, "another type of work which may be considered  
15 directly and closely related to the performance of  
16 managerial duties." And it says:

17           "In many establishments, the proper  
18 management of a department requires the  
19 performance of a variety of occasional,  
20 infrequently recurring tasks which can not  
21 practicably be performed by the production  
22 workers and are usually performed by the  
23 executive. These small tasks, when viewed  
24 separately without regard to their relationship



1       to the executive's overall functions, might  
2       appear to constitute nonexempt work. In  
3       reality, they are the means of properly carrying  
4       out the employee's management functions and  
5       responsibilities in connection with men,  
6       materiel, and production. The particular tasks  
7       are not specifically assigned to the executive,  
8       but are performed by him in his discretion. It  
9       might be possible for the executive to take one  
10      of his subordinates away from his usual tasks,  
11      instruct and direct him in the work to be done,  
12      and wait for him to finish it. It would  
13      certainly not be practicable, however, to manage  
14      a department in this fashion. With respect to  
15      such occasional and relatively inconsequential  
16      tasks, it is the practice in industry generally  
17      for the executive to perform them rather than  
18      delegate them to other persons. When any one of  
19      these tasks is done frequently, however, it  
20      takes on the character of a regular production  
21      function which could be performed by a nonexempt  
22      employee and must be counted as nonexempt work.

23                "In determining whether such work is  
24      directly and closely related to the performance

1       of the management duties, consideration should  
2       be given to whether it is 1) the same as the  
3       work performed by any of the subordinates of the  
4       executive, or 2) a specifically assigned task of  
5       the executive employees, or 3) practicably  
6       delegable to nonexempt employees in the  
7       establishment, or 4) repetitive and frequently  
8       recurring."

9       So, that's what it says.

10               Now, I was asked, can I come up with some  
11       examples of that, and I've thought of a few things. And,  
12       you know, I'm not -- I've never actually had occasion to  
13       have to apply this particular section of the regulations,  
14       I will confess, but it seems to me that the following  
15       examples may capture what this regulation is trying to  
16       get at, in different kinds of contexts.

17               One example might be the manager of a finance  
18       department, where the employees in the finance department  
19       -- excuse me -- where the corporate management turns to  
20       that chief financial officer and says, "We need you to  
21       run some numbers" on something that is a unique thing  
22       that they don't normally maintain in the course of their  
23       regular bookkeeping operations. "We need you to compile  
24       these statistics in terms of our receivables and get them

1 to the parent corporation as soon as possible." Now,  
2 that is not a task that is a regular part of the chief  
3 financial officer's job, but it's also not a regular part  
4 of the job of any of the subordinates in the department,  
5 the non-managerial subordinates. It's a unique  
6 assignment that calls for somebody to pull together some  
7 data. It's also assumed a non- -- a repetitive and non-  
8 frequently recurring instruction. And the CFO makes the  
9 decision that it's not practical to pull his staff away  
10 from their normal bookkeeping duties, and instead, he's  
11 going to do that himself. It seems to me that that might  
12 be an example of an occasional task that should properly  
13 be deemed as exempt because it represents a means of  
14 properly carrying out the management functions and  
15 responsibility in connection with men, materiel, and  
16 production.

17 Another example might be a production foreman  
18 who is in charge of a machine shop, and occasionally  
19 there is the need to recalibrate a machine because of a  
20 unique product specification. The manager decides to do  
21 it himself rather than call -- rather than pull away a  
22 production worker from some task operating the machine  
23 and have him do that job. Assuming it meets all of the  
24 other requirements of this exemption, it might be

1 appropriate to deem that task to be a proper extension of  
2 managerial function.

3           A third -- the final and third example that I  
4 thought might be illustrative is, assume in a retail  
5 environment that you have a display case that contains  
6 glassware, and a customer inadvertently knocks off the  
7 top shelf and everything falls to the floor and breaks.  
8 Rather than the manager interrupting the sales staff to  
9 take them away from the line of customers to have them  
10 sweep up the glass on the floor, the manager decides to  
11 exercise her discretion to go pick up the glass so that  
12 nobody cuts themselves. Assuming again that this is not  
13 a regular part of the subordinates' job, that it's not a  
14 regular part of the manager's job, that it's infrequent,  
15 that it's small, et cetera, it seems to me it might fit  
16 within this exemption.

17           I do not see this occasional work issue being  
18 something that's a catch-all. I don't see it as being  
19 some loophole that you're doing to drive a truck through.  
20 Nobody is going to swing the balance on whether  
21 somebody's exempt or nonexempt through the performance of  
22 such occasional work. But I think it simply represents  
23 part of the overall federal regulatory explanation of  
24 what constitutes duties that might be properly recognized

1 as directly and closely related to the performance of the  
2 exempt work. And it's proper to recognize it, along with  
3 all of the other sections that elaborate on the meaning  
4 of that term.

5           So that -- with respect to that point of  
6 contention, I think it's proper that we not delete it. I  
7 think it would be confusing to start picking away at  
8 elements of this federal definition, and I would urge  
9 that you adopt it all.

10           There has been some question about the proposed  
11 modification of the professional exemption, I understand.  
12 And I would say to you that right now the DLSE manual  
13 adopts every one of the sections of the federal  
14 regulation that we've referred to here. It is  
15 specifically references in the DLSE -- the current DLSE  
16 manual as being a tool for their interpretation of the  
17 learned or artistic professional exemption. Now, I do  
18 not believe that restating the professional exemption in  
19 a manner that clearly lays out for everyone to understand  
20 what the elements are of the exemption is going to  
21 materially change the operation of the exemption in the  
22 State of California.

23           I believe that it's very important for the IWC  
24 to provide business with some workable tools to answer

1 some of the difficult questions and some of the  
2 controversial questions that are -- that are ongoing in  
3 this area of the law, and to recognize that the whole  
4 facts and circumstance associated with the performance of  
5 work needs to be examined in determining what the  
6 character of the work is, and that, unfortunately,  
7 resorting to simple formulas is not always going to be  
8 easy, the easy way of answering the question. I think  
9 these federal regulations in their entirety provide those  
10 tools and that's why we've -- and I would urge you not to  
11 wordsmith them or to monkey around with them or to  
12 substitute words here and there for what's in the federal  
13 regulations, because I think that, again, creates  
14 uncertainty, it creates vagueness, it creates an  
15 opportunity for somebody to try to figure out why you've  
16 changed that wording and why you've reorganized the  
17 sections and why you're referring to different  
18 regulations in connection with some exemptions than  
19 relate to them under the federal regulations.

20 I think we should strive for as clear and  
21 straightforward an adoption of these relevant federal  
22 rules as we possibly can.

23 COMMISSIONER DOMBROWSKI: Okay. We're --

24 MR. YOUNG: Right. Just in closing, I just want

1 to add one footnote, that in keeping with promises we  
2 made, this does not include construction or building  
3 trades.

4 So --

5 COMMISSIONER DOMBROWSKI: All right.

6 Okay. You want to open it to questions?

7 COMMISSIONER BROAD: Mr. Young, I do appreciate  
8 that you've managed to moderate this proposal since its  
9 first inception six months ago. And maybe if we had  
10 another six months, we might get there. In any event, I  
11 think it's gone down from 100 percent illegal to only in  
12 the 90 percent -- you know, it's --

13 (Laughter)

14 COMMISSIONER BROAD: No, it's probably 10  
15 percent illegal.

16 Anyway, let me ask you a couple questions, then  
17 I'll ask Ms. Thompson.

18 Is it your intention here to change California  
19 law?

20 MR. YOUNG: No.

21 COMMISSIONER BROAD: So, no fewer workers that  
22 are entitled to overtime will be exempted than exist now  
23 as the law is enforced.

24 MS. THOMPSON: Well, I can't speak to how the

1 law is enforced.

2 COMMISSIONER BROAD: I was asking Mr. Young.

3 MR. YOUNG: No fewer workers would be exempt?

4 COMMISSIONER BROAD: Yeah, we're not -- in other  
5 words, there are not going to be any more workers or  
6 classes of workers who are going to be exempted from  
7 overtime.

8 MR. YOUNG: That they're entitled to, no. I  
9 mean, what this will do -- one thing -- one thing that's  
10 happened is, because of this, there have been many -- in  
11 fact, I think this has worked -- the current situation  
12 has worked to the disadvantage of many workers in  
13 California because those -- many of them who have been  
14 managers have now been reclassified hourly, lost some of  
15 the prerequisites that go with the managerial status, so  
16 they've lost some -- some of the extended benefits and  
17 some of the extended options that they've had because  
18 employers have been concerned about the clarification of  
19 what a manager is. This will allow those people to gain  
20 back the benefits that they lost and the opportunities  
21 they lost.

22 Now, so -- as far as -- so, the answer to your  
23 question, anybody who is entitled to overtime under --  
24 nothing in our proposal will prevent them from getting



1 that, however, will allow workers who are truly managers  
2 to be clearly reclassified as that and be able to operate  
3 and to function as that.

4 COMMISSIONER BROAD: So there will be an  
5 opportunity to reclassify workers who are now classified  
6 as nonexempt.

7 MR. YOUNG: Not reclassified. I misspoke. It  
8 will give the people -- again, it will give those  
9 managers who now have been -- who, in some cases, have  
10 been given -- now been shifted to hourly, this will then  
11 give employers a clarity and a definition of what a  
12 manager is. And many of the employers, certainly in the  
13 retail setting, have been waiting for the IWC to act in  
14 response to what they felt the opportunity of clarity  
15 with AB 60.

16 COMMISSIONER BROAD: I believe that -- oh, let  
17 me say, by the way, I -- since your famous meeting with  
18 Senator Burton, his thunderous support for your position  
19 has been notably silent. I mean, he could be in here now  
20 yelling at us all --

21 MR. YOUNG: Right.

22 COMMISSIONER BROAD: -- to take care of your  
23 problem, but I don't see that.

24 MR. YOUNG: Well, but I don't -- but I don't

1 think that was the -- I mean, if you -- if you -- but --

2 COMMISSIONER DOMBROWSKI: He's not here  
3 thundering at us not to, either.

4 MR. YOUNG: Right.

5 Commissioner Broad, I mean, if you're finished  
6 cueing the audience, I'll respond. I mean --

7 (Laughter)

8 MR. YOUNG: That was -- I mean, certainly, if  
9 you want to invite Senator Burton to come in and speak on  
10 his intent, all I was trying to give you is a capsulation  
11 of what occurred.

12 COMMISSIONER BROAD: I understand.

13 MR. YOUNG: And that was his response to an  
14 objection that had been raised, much as yours have been  
15 raised. And so, we never asked him to come in. We think  
16 that the law is clear this Commission has the authority  
17 to do what we propose.

18 COMMISSIONER BROAD: Now, let me ask you this  
19 question. We seem to -- we have a strict --

20 MR. YOUNG: Can I get a lifeline someplace?

21 (Laughter)

22 COMMISSIONER BROAD: We have a strictly -- we  
23 have a strictly quantitative -- we have a strictly  
24 quantitative test in California, correct? That's the

1 "primarily engaged" test. That is what we've always  
2 done.

3 MR. YOUNG: Pardon?

4 COMMISSIONER BROAD: That is our test. That's  
5 what we codified. It requires that exempt duties -- you  
6 have to do exempt duties, perform exempt duties more than  
7 50 percent of the time in order to be exempt. Is that  
8 correct?

9 MR. YOUNG: Right.

10 COMMISSIONER BROAD: Okay.

11 MR. YOUNG: It's my understanding that's exactly  
12 what the law says. And --

13 COMMISSIONER BROAD: So, now, that's your intent  
14 here.

15 MR. YOUNG: -- that was -- and that was, for the  
16 first time, codified in AB 60.

17 COMMISSIONER BROAD: Correct.

18 MR. YOUNG: And that was part of, again, what  
19 was agreed to in Senator Burton's office.

20 COMMISSIONER BROAD: I understand.

21 MR. YOUNG: Right, okay. Okay. I just want to  
22 clarify.

23 COMMISSIONER BROAD: And -- although it was in  
24 the bill from the very outset.

1 MR. YOUNG: Absolutely.

2 COMMISSIONER BROAD: I understand.

3 MR. YOUNG: And we -- and we had opposed it  
4 until -- until there was an understanding, again, that  
5 the Commission would be given authority to try to clarify  
6 this, the duties.

7 COMMISSIONER BROAD: Right, the definition of  
8 duties.

9 MR. YOUNG: Right.

10 COMMISSIONER BROAD: Okay. So, what -- the  
11 question, then, I would have is, we have exempt duties  
12 and we have nonexempt duties. And we have a class of  
13 duties called occasional duties that you've discussed,  
14 and we have a class of duties that are closely related  
15 duties. In any situation, is it your intent that if you  
16 add those three kinds of duties up, if you perform them  
17 more than 50 percent of the time, you can be considered  
18 exempt?

19 MR. YOUNG: Well, since this is mirroring the  
20 federal law, I would like to let Lynn Thompson answer  
21 that because she's more familiar with how the federal law  
22 is actually applied. It's our understanding that in the  
23 federal law, there has been very little -- I mean, there  
24 has been no controversy and it hasn't -- the definition

1 of occasional tasks hasn't been an issue. But I'll let  
2 Lynn respond to that question.

3 MS. THOMPSON: The definition of an exempt -- of  
4 exempt work, for purposes of determining whether the  
5 quantitative limitation under federal law and if you  
6 adopt this state law, is met, includes work that is  
7 directly and closely related.

8 COMMISSIONER BROAD: And occasional.

9 MS. THOMPSON: Occasional is one subspecies of  
10 directly and closely related work, as it says repeatedly  
11 in the sections that I read to you.

12 COMMISSIONER BROAD: But it's not -- it's not  
13 exempt work. It's not the exempt duties. It's exempt  
14 duties -- it's other duties that are related to exempt  
15 duties that aren't exempt duties.

16 MS. THOMPSON: It's other duties that are  
17 directly and closely related to exempt duties.

18 COMMISSIONER BROAD: Okay. So they're not  
19 exempt duties. That's why they need a separate  
20 definition. Is that right?

21 MS. THOMPSON: They are duties that are directly  
22 and closely related to exempt duties. They are exempt  
23 duties if you recognize that exempt duties -- that the  
24 definition of what are exempt duties includes duties that

1 are directly and closely related.

2 COMMISSIONER BROAD: Okay. So, let's take --  
3 let's take your example of the person who cleans up the  
4 broken glass.

5 MS. THOMPSON: Um-hmm.

6 COMMISSIONER BROAD: That's -- that, in your  
7 opinion, is an occasional duty. They're an executive of  
8 a corporation, in the normal sense, and they clean up  
9 broken glass. Are you telling me, if they spend half  
10 their time cleaning up broken glass, they are -- they are  
11 still exempt?

12 MS. THOMPSON: No, because as this regulation  
13 clearly states, when any one of these tasks is done  
14 frequently, however, it takes on the character of a  
15 regular production function which could be performed by a  
16 nonexempt employee and thus be counted as nonexempt. The  
17 regulation also repeatedly uses terms like "infrequently  
18 recurring," "occasional," and "small," so I think --

19 COMMISSIONER BROAD: Aha! So, it's -- then,  
20 basically, it should fit within our 50 percent test. In  
21 other words, what's the problem? If you do occasional --  
22 this is what I don't understand about this. I mean, if  
23 you do occasional duties that are not exempt, as long as  
24 they don't reach 50 percent of the time, then why would -

1 - what's the problem?

2 MS. THOMPSON: What this is saying is that it is  
3 recognizing that that kind of occasional work that is a  
4 means of properly carrying out the employee's management  
5 functions and responsibilities is properly viewed as an  
6 extension of the managerial role. It is not an -- it is  
7 not the kind of nonexempt duty that is customarily  
8 performed by subordinates.

9 So, if your -- if your question is trying to  
10 assume that there are some employees in the store whose  
11 customary duty includes the picking up of broken glass,  
12 then this -- you know, I think you would -- you would  
13 certainly look at this section and say, "Well, that  
14 doesn't appear to meet the four criteria in here."

15 COMMISSIONER BROAD: Well, that was your  
16 example, not mine. It would seem to me in every store  
17 there's someone assigned to customarily pick up glass.

18 MS. THOMPSON: That may not be true. You know,  
19 you --

20 COMMISSIONER DOMBROWSKI: But the point -- let  
21 me -- let me remind you, we are trying with this proposal  
22 to get consistent interpretation of the duties. And --

23 COMMISSIONER BROAD: Well --

24 COMMISSIONER DOMBROWSKI: -- as she just said --

1 MS. THOMPSON: Right.

2 COMMISSIONER DOMBROWSKI: -- if someone takes  
3 any shape or form of doing occasional duties on any kind  
4 of frequent basis, they are not going to meet the 50  
5 percent test. It by definition is --

6 COMMISSIONER BROAD: Well, you can't have it  
7 both ways. Either they meet the 50 percent test or they  
8 don't. What you're saying is they could meet -- they can  
9 do nonexempt duties 50 percent of the time and occasional  
10 duties 10 percent of the time and closely related duties  
11 20 percent of time --

12 COMMISSIONER DOMBROWSKI: No.

13 COMMISSIONER BROAD: -- and still be exempted.

14 COMMISSIONER DOMBROWSKI: No.

15 COMMISSIONER BROAD: No or yes?

16 COMMISSIONER DOMBROWSKI: No.

17 COMMISSIONER BROAD: No? Okay. So, then when  
18 you add the three of them together, they have to equal no  
19 more than 50 percent. Is that right?

20 COMMISSIONER DOMBROWSKI: What we're saying is  
21 that, from a categorization viewpoint, there is nothing  
22 wrong with taking the duties that are recognized at the  
23 federal level and making them consistent to be the duties  
24 that satisfy the 50 percent test.



1                   COMMISSIONER BROAD:   Okay.   Let me then ask that  
2   in another way.   The federal test says they have to be  
3   occasional.   How occasional?   How much time?   How much  
4   time is it?   We have a quantitative test.   How much time  
5   doing nonexempt duties can you do?

6                   And now, if you're simply saying you're going to  
7   classify nonexempt duties as exempt duties and call them  
8   occasional, but say you can't do them too much, but you  
9   can do them more than 50 percent of the time, it clearly  
10   violates California law, does it not?

11                  MS. THOMPSON:   I think this makes it pretty  
12   clear that you're not talking about nonexempt duties,  
13   number one, you know.   It -- I mean, I think where you're  
14   going wrong is that you are assuming that the occasional  
15   duties are nonexempt.

16                  COMMISSIONER BROAD:   Yeah.   No --

17                  MS. THOMPSON:   And what this is trying is  
18   capture is a different idea.

19                  COMMISSIONER BROAD:   No, you're trying to  
20   bootstrap -- you're trying to bootstrap nonexempt duties  
21   as exempt duties.

22                  All right.   Let's move on.

23                  (Applause)

24                  COMMISSIONER BROAD:   No.   No, no, no, no, no,

1 no. No, no.

2 All right. Let's talk about -- let me just ask  
3 a very general question. With regard to the executive  
4 exemption in your proposal, what are the exempt duties?  
5 Is that Items (1) through (4)?

6 MS. THOMPSON: Exempt duties under our proposal  
7 are all of those duties that are described in the federal  
8 regulations, which are cited, which include the duties  
9 that are specifically mentioned in (1) through (4), but  
10 also include a whole list of duties that encompass other  
11 things in addition to those duties. It's all laid out in  
12 glorious detail.

13 COMMISSIONER BROAD: Okay.

14 MS. THOMPSON: And the duties that are directly  
15 and closely related thereto.

16 COMMISSIONER BROAD: Uh-huh. And you've got to  
17 do -- okay.

18 Now, what is -- on Number 1, it says, "Whose  
19 duties" -- "A person employed in an executive capacity  
20 means any employee whose duties and responsibilities  
21 involve the management." What does "involve" mean, and  
22 where is that in the federal regulations?

23 MS. THOMPSON: Well, as you know, Mr. Broad --  
24 you want me to talk about why that change was made? We

1     were negotiating with you --

2                 COMMISSIONER BROAD:   Um-hmm.

3                 MS. THOMPSON:   -- who were -- you were concerned  
4     that what we -- what we originally had stated was the  
5     first -- was the first element of the federal long test.

6                 COMMISSIONER BROAD:   Right, which was the  
7     primarily -- primary duty test.

8                 MS. THOMPSON:   Which was primary duty.   And we  
9     tried and tried to make you understand that by saying in  
10    the first element that you have to -- have to have as  
11    your primary duty management, we were not modifying the  
12    obligation in Part (5) that you spend more than half your  
13    time engaged in management tasks.

14                COMMISSIONER BROAD:   Yes, but what I suggested  
15    to you is that you had to be --

16                MS. THOMPSON:   And so -- let me go -- let me  
17    just finish.

18                COMMISSIONER BROAD:   I'm sorry.   Go ahead.

19                MS. THOMPSON:   So -- but to try to eliminate any  
20    possible confusion that we were attempting to somehow  
21    substitute a qualitative test for the -- in the  
22    California standard, we, at your request, eliminated that  
23    verbiage.   But -- and -- but we still have to talk about  
24    what kind of animal we're dealing with here.   So we --

1 all A really does at this point is, in each of the  
2 exemptions, is kind of describe generally the kind of  
3 animal that this is, that in A, this is somebody who is  
4 involved in the management of the in the enterprise --

5 COMMISSIONER BROAD: Right.

6 MS. THOMPSON: -- or who participates in it.  
7 You could use one of a number of terms.

8 COMMISSIONER BROAD: Uh-huh.

9 MS. THOMPSON: But the effort is to tell the  
10 reader at the outset, "This is the kind of person we're  
11 talking about." Now we have to talk about what do they  
12 do. They have to hire and fire, they have to responsibly  
13 direct, they have to regularly exercise discretion, and  
14 they have to spend more than half their time engaged in  
15 exempt managerial duties, as those duties are defined in  
16 the law.

17 COMMISSIONER BROAD: So these things in (1)  
18 through (4) aren't their duties.

19 MS. THOMPSON: Sure. They're partly -- I mean,  
20 you will see that --

21 COMMISSIONER BROAD: So you've got part of their  
22 duties there and part of them are in federal law  
23 somewhere?

24 MS. THOMPSON: No. I mean, all of this comes

1 out of federal law. As you know, this is the federal  
2 long test.

3 COMMISSIONER BROAD: No, no. But I mean if an  
4 employer wants to figure out what this means, they go  
5 read this and then they go read the federal regulations,  
6 and then they try to figure out, adding them together,  
7 what the duties are? I just -- I'm just curious.

8 MS. THOMPSON: Well, you know the answer, so  
9 you're not curious. But as you know --

10 COMMISSIONER BROAD: Well, I don't know.

11 MS. THOMPSON: -- Section 541.102 --

12 COMMISSIONER BROAD: You might surprise me.

13 MS. THOMPSON: 541.102 of the federal regulation  
14 states, in two long paragraphs, which takes up about a  
15 third of the page, a list of duties. You remember when  
16 this proposal first became before the Commission, what  
17 was tried at that point was to try to do this, let's list  
18 out all of the duties that we consider to be exempt. And  
19 that became very controversial, so --

20 COMMISSIONER BROAD: Right. Now, here's the  
21 problem with it, though. If you look at your draft and  
22 you look at as it's modified in mine, the difference is  
23 that it says they're primarily engaged in the management  
24 of the enterprise, not they're involved somehow in

1 management. That is -- and that's the -- yeah, you took  
2 it out and you put something else in there that's  
3 unusual.

4 MS. THOMPSON: Well --

5 COMMISSIONER BROAD: I don't understand why we  
6 just don't say they're primarily engaged as managers.  
7 What's the objection to doing that?

8 MS. THOMPSON: The reason that I thought that  
9 was confusing was as follows. I think that it is  
10 confusing to start talking about the same legal  
11 requirement, which is "primarily engaged in," in two  
12 separate sections and then try to figure out were they  
13 saying that it's some sort of a different requirement in  
14 A than it is in -- or in (1) than it is in (5)? Or is it  
15 the same?

16 And -- and the other reason was that we're  
17 trying to really help employers go down the list of  
18 duties and try to model themselves against -- if they're  
19 operating in 50 states, they know that they're going to  
20 have to satisfy (1) through (4) everywhere else, and  
21 they're going to have to satisfy, in addition, (5) in  
22 California. And it's a very understandable framework --

23 COMMISSIONER BROAD: That's right. They have  
24 to --

1 MS. THOMPSON: -- for employers.

2 COMMISSIONER BROAD: That's right. They have to  
3 satisfy (5), (6), (7), through (100), if that's  
4 California law.

5 MS. THOMPSON: Right.

6 COMMISSIONER BROAD: And they have to pay the  
7 state minimum wage, whether -- you know, even though they  
8 satisfy the federal minimum wage. And that's the basic  
9 constitutional nature of our government.

10 Now, why, in Number (4) do you change our  
11 existing test, and the test for the administrative and  
12 professional exemption, from "exercising discretion and  
13 independent judgment" to "exercising discretionary  
14 powers"? That is a  
15 -- that's a total change from how the law that's been  
16 here since 1947. Why did you change that, just for the  
17 executive?

18 MS. THOMPSON: Well, it -- the only -- because,  
19 under federal law, the way the exemption is worded is  
20 "discretion and independent judgment," and there --  
21 there's a federal reg that talks about what that means.

22 COMMISSIONER BROAD: And you don't want that for  
23 executives.

24 MS. THOMPSON: No, that's -- well, that's what I

1 think -- that's -- I'm talking about administrative. For  
2 executives, under federal law, the test is termed  
3 slightly differently. And we would like -- we feel  
4 there's a real advantage to maintaining conformity. The  
5 difference seems to me to be a fairly small one, "who  
6 regularly exercises discretionary powers." Now -- you  
7 know, and there is a federal regulation that talks about  
8 that in the context of the executive exemption.

9           Again, for purposes of trying to help people  
10 comply with California law, you know, there -- I don't  
11 see that -- I -- I think that the value of having a  
12 standard that achieves consistency, for the IWC to say,  
13 "When we look at defining duties for the exemption, let's  
14 look at defining them in a way that is consistent with  
15 the way they're going to be defined in the other 49  
16 states," to the extent we can -- and clearly, on this  
17 element you can -- you can define it using exactly the  
18 same words, and you can loop right into that federal  
19 regulation for the executive exemption, and let's make it  
20 clear and consistent and not have an additional bell or  
21 whistle, and that somebody other than you guys is going  
22 to try to figure out, "What does that mean?"

23           COMMISSIONER BROAD: Well, we've had that in  
24 California law since 1947. Are you trying to say that



1 executives of companies shouldn't be required to use  
2 independent judgment as a condition of exercising those  
3 duties? Why would we change that?

4 MS. THOMPSON: I'm not saying anything. I'm  
5 saying that I think that using the federal language --  
6 using the federal language is -- achieves every purpose  
7 that you would reasonably need to achieve. By requiring  
8 the regular exercise of discretion, it seems to me that  
9 any small distinction that you get with the words  
10 "independent judgment" is very small. I don't know what  
11 -- I don't know really what that would add. Maybe you  
12 do.

13 COMMISSIONER BROAD: Oh. Well, then, you don't  
14 have any objection to put it back.

15 MS. THOMPSON: Like I said, I do, because I  
16 think we should try to standardize the requirements as  
17 much as possible to make them more easily complied with  
18 and understandable, and not have embellishment on words  
19 like "independent judgment" elsewhere.

20 COMMISSIONER BROAD: But you acknowledge that  
21 it's a change in California law that we've had since  
22 1947.

23 MS. THOMPSON: I acknowledge that the wording is  
24 different.

1           COMMISSIONER BROAD: Well, I mean, it says  
2 "discretionary powers" in this one and "discretion and  
3 independent judgment" in the others. And it used to say  
4 "discretion and independent judgment" for this class of  
5 exemption as well. So, it's a change in the law.  
6 Please, you can acknowledge that. What you think it  
7 means or doesn't mean is another question.

8           You're taking the Fifth?

9           MS. THOMPSON: Sure.

10          (Laughter)

11          COMMISSIONER DOMBROWSKI: Let me go back to --

12          COMMISSIONER BROAD: Wait. Excuse me. You can  
13 do the resurrection part in a minute.

14          (Laughter)

15          COMMISSIONER BROAD: Let me just continue.

16          Down in Paragraph (5), there's this unusual  
17 statement:

18          "The work actually performed by the employee  
19 during the course of the work week must, first  
20 and foremost, be examined and the amount of time  
21 the employee spends on such work, together with  
22 the employer's realistic expectations and the  
23 realistic requirements of the job, shall be  
24 considered in determining whether the employee

1 satisfies this requirement."

2 What does that mean?

3 MS. THOMPSON: Well, as you know, Mr. Broad,  
4 that comes right out of a California Supreme Court  
5 decision that was issued --

6 COMMISSIONER BROAD: Um-hmm.

7 MS. THOMPSON: -- and which we intend to refer  
8 to in the Statement of Basis, to make it clear that  
9 that's what we're talking about.

10 This is an area where we're looking for  
11 guidance.

12 COMMISSIONER BROAD: I believe you mean the  
13 *Ramirez* decision of the California Supreme Court,  
14 correct?

15 MS. THOMPSON: *Ramirez v. Yosemite Water*.

16 COMMISSIONER BROAD: So, you believe this is a  
17 correct statement of the law in *Ramirez*?

18 MS. THOMPSON: I believe that it is a correct  
19 reference to the law. It doesn't quote *Ramirez*, which  
20 goes on for a long time on this subject.

21 COMMISSIONER BROAD: It certainly does.

22 MS. THOMPSON: But I believe it is an accurate  
23 reference to *Ramirez* in what it says. And I think that  
24 if you have any concerns about that, Mr. Broad, we can

1 make it abundantly clear in the regulations that, by  
2 referring to *Ramirez*, we don't intend to modify anything  
3 that the Supreme Court said, nor do you intend to  
4 disagree with any other sections that aren't referenced.

5 COMMISSIONER BROAD: Well, I take particular  
6 exception to this little number here, because it's really  
7 quite intellectually dishonest, what you've done here.

8 The *Ramirez* decision dealt with the outside  
9 sales exemption. It did not deal with the executive  
10 exemption. The issue was a very narrow issue in *Ramirez*  
11 that had to do with whether an employer -- it was an  
12 evidentiary issue within the case in which the employer  
13 had said that the outside salesperson, what was just a --  
14 who was a truck driver, was just a bad salesperson, and  
15 therefore they should -- they could classify him as an  
16 outside salesperson.

17 You quote the court, in effect, in the first  
18 sentence, but you leave out the rest. And the rest is a  
19 very significant further elucidation of the Supreme  
20 Court's view of the outside sales exemption. The -- and  
21 it -- what it says is that whether the employer  
22 disciplined the person for not performing those duties is  
23 relevant to the consideration, and you have to look at  
24 the realistic expectations in light of that, and you have

1 to look at whether there's a concrete expression of  
2 employer displeasure over the employee's so-called  
3 substandard performance, and whether the employer's  
4 expressions of displeasure were themselves realistic,  
5 given the actual overall requirements of the job.

6 So, this particular thing doesn't belong here at  
7 all and misquotes the California Supreme Court. And it's  
8 particularly inappropriate to do that, in my view.

9 MS. THOMPSON: Okay. Well, I don't think it  
10 does. And I also would say that what -- what you're  
11 talking about were the Supreme Court's suggestion of  
12 factual information that might be relevant to determining  
13 whether these things were realistic expectations and  
14 requirements of the job. The question of -- if an  
15 employer is asserting that there are certain realistic  
16 expectations and requirements -- the whole context of  
17 this is to say that an employee should not be able to  
18 render himself nonexempt by doing something that is  
19 inconsistent with what the employer tells him to do.  
20 That -- that's the narrow question that the Supreme Court  
21 is addressing in this section of *Ramirez* that -- the  
22 Supreme Court's recognizing it isn't really fair if you  
23 just look at what the employee is doing and not  
24 recognizing that the employer's realistic expectation

1 should also play a role in determining whether the  
2 employee is exempt. Otherwise people could sort of work  
3 themselves out of the exemption  
4 by --

5 COMMISSIONER BROAD: Actually, that's 180  
6 degrees --

7 MS. THOMPSON: -- by fiat.

8 COMMISSIONER BROAD: -- backwards from what the  
9 Supreme Court said --

10 MS. THOMPSON: Can I finish, please?

11 COMMISSIONER BROAD: -- in *Ramirez*.

12 MS. THOMPSON: Can I finish, please?

13 That's the point the Supreme Court's addressing.  
14 And what the court says is that so it is appropriate to  
15 look at the employer's expectations. But in evaluating  
16 what the realistic expectations are, you might also want  
17 to know did the employer ever discipline the employee for  
18 failing to do what the employer is saying he wasn't  
19 doing. If the employer is trying to rely on that  
20 argument, there are issues of proof and evidence that can  
21 be relevant to considering the issue of what are  
22 realistic expectations: What does the job description  
23 say? Did the employer ever discipline?

24 I don't think all of that is appropriate to put

1 in the wage order. I would be perfectly --

2 COMMISSIONER BROAD: Well --

3 MS. THOMPSON: -- in agreement with you to say  
4 that referring to all of the Supreme Court's statements  
5 and making it clear that one should refer to the whole  
6 text of the court's decisions is appropriate. And that  
7 can be clarified in the Statement of Basis.

8 COMMISSIONER BROAD: Well, you know, the Supreme  
9 Court sort of refers to itself.

10 Let's get at what you're really talking about  
11 here. You mean to say that if the employer has a  
12 reasonable expectation that the employee will be engaged  
13 in managerial duties, and rank-and-file employees are  
14 absent and they take it upon themselves to fill in and do  
15 non-managerial work, and they never told them to do that,  
16 that then that non-managerial work is counted as exempt?

17 MS. THOMPSON: No, I'm not saying that.

18 COMMISSIONER BROAD: So what's the relevance of  
19 the consideration of the expectation of the employer? I  
20 thought you said it was that what the job description was  
21 and what -- I'm very confused by this. I don't -- I  
22 don't get it.

23 MS. THOMPSON: I would just recommend that you  
24 read *Ramirez*, and it's pretty clear.

1           COMMISSIONER BROAD: No, I have. I was very  
2 pleased when it came out. It was a victory for workers,  
3 although you wouldn't know it from here.

4           (Laughter and applause)

5           COMMISSIONER BROAD: I'd like to know what  
6 you're talking about here. How is this relevant to  
7 determining whether someone is spending more than 50  
8 percent of their time engaged in exempt duties?

9           MS. THOMPSON: The Supreme Court said it was  
10 relevant, under the --

11          COMMISSIONER BROAD: No, how do --

12          MS. THOMPSON: -- quantitative standard of the  
13 outside sales exemption.

14          COMMISSIONER BROAD: Well, how is it enforced?  
15 How is it applied? You look at their -- you look at what  
16 the employer told them their job was, and if they did a  
17 different job, which was nonexempt duties, it's counted  
18 as exempt?

19          MS. THOMPSON: No.

20          COMMISSIONER BROAD: The employer -- well, I  
21 thought you said the employer wouldn't be, quote,  
22 "punished" if the employee did what they weren't supposed  
23 to do.

24          MS. THOMPSON: I'm just saying that the Supreme



1 Court was addressing -- was postulating that question.  
2 And I don't have *Ramirez* in front of you or I would read  
3 you the entire paragraph, because I -- you know -- but I  
4 don't know how fruitful this debate's going to be. You  
5 know, I think you can read *Ramirez*. I'm telling you this  
6 is a reference to *Ramirez*. I think you can make it  
7 absolutely clear in the Statement as to Basis what it is,  
8 and that should prevent a problem with it being  
9 misconstrued.

10 COMMISSIONER BROAD: Well, I believe it's taking  
11 *Ramirez* entirely out of context.

12 Moving on to the professional exemption, why did  
13 you eliminate California's long-standing and very clear  
14 automatic exemption of professional employees who are  
15 licensed and certified by the State of California and are  
16 in certain occupations, attorneys, doctors, and so forth?

17 MS. THOMPSON: I don't think I have. Those  
18 individuals are clearly exempt under the federal  
19 standard. What you have, as you know, in the evolution  
20 of California law, was that we started with enumerated --  
21 limited enumerated professions qualifying for the  
22 executive exemption. And so, the exemption was limited  
23 to those enumerated professions. Then we had a  
24 broadening of the exemption to include the learned and

1 artistic professions. And it is in the learned and  
2 artistic category that the DLSE started referring to all  
3 of these federal regs. Those federal regs, in defining  
4 what the learned professions are, clearly encompass the  
5 professions that the IWC had previously identified as  
6 being exempt. In fact, the distinction under federal law  
7 is that if you're a licensed professional, you're exempt  
8 from the salary requirements under federal law. Now,  
9 that apparently is not true in California, in light of AB  
10 60, which makes the salary requirements applicable to  
11 professionals. But clearly, under federal law, those  
12 licensed occupations are exempt.

13 COMMISSIONER BROAD: Well, here's what I think  
14 it does, and I don't know why -- what the motivation here  
15 -- is I think what it makes is unlicensed professionals,  
16 law school graduates who have not yet been licensed and  
17 so forth, accountants who have not yet been licensed, are  
18 -- would then, I think, be subject, arguably, to  
19 exemption when they are not now.

20 MS. THOMPSON: Well, I will assure you that the  
21 Department of Labor and the courts that have construed  
22 the Fair Labor Standards Act have clearly said that  
23 that's not the case. And in fact, the DLSE has  
24 specifically incorporated some opinions to that effect,

1 dealing with accountants, by the way. Those are actually  
2 specifically incorporated and referred to in DLSE  
3 enforcement policy, making it clear that the learned  
4 profession definition in California, as under federal  
5 law, does not include people who perform a great deal of  
6 routine work, even though they're called accountants, you  
7 know, that it is limited -- clearly, CPA's are going to  
8 satisfy the requirement, but other -- other accountants  
9 who are not CPA's might, depending upon the level at  
10 which they are practicing. And it's a question of  
11 whether they're a learned professional.

12           So, I don't think we're going to have a  
13 wholesale alteration, or really any alteration at all,  
14 under California law, because those are currently the  
15 rules.

16           COMMISSIONER BROAD: Are you aware of any  
17 employers who've come forward to ask that the  
18 professional exemption be changed, other than yourselves?

19           MS. THOMPSON: Like I said, I would not concede  
20 that we're changing it. I think that what the IWC is  
21 doing is it is articulating the standards that right now  
22 are articulated in the form of DLSE enforcement policy,  
23 an entity that has no authority to regulate. I think the  
24 IWC has been asked to do this by the Legislature. It

1 should do it comprehensively. There's no reason not to  
2 address the professional exemption and to continue to  
3 leave that in this kind of vague thing, where the DLSE is  
4 actually making the law in this area.

5 COMMISSIONER BROAD: So, you've mentioned  
6 several times the DLSE, and you mentioned that there were  
7 winds of political change. Is it your sense that you  
8 would like to lock in things as they were? Or -- what is  
9 the -- I mean, what -- what is your criticism of the  
10 Davis administration with regard to enforcement of these  
11 laws? That's the State Labor Commissioner, as an  
12 appointee of the Governor, Mr. Lujan. What has he done  
13 here that is so bad in interpreting the law?

14 MS. THOMPSON: Well, let me give you one  
15 example. There's material that's in the DLSE enforcement  
16 manual that people will stand up and tell you is illegal.  
17 And, you know, it's out there published. If you go right  
18 now and you go down to the DLSE and say, "Can I have a  
19 copy of your enforcement manual?," you will get stuff  
20 that -- that if you try to rely upon and use, people will  
21 tell you, "No, that's illegal."

22 Now, that -- and I can -- I can -- believe me, I  
23 can give you a number of examples, because I've been  
24 practicing for twenty years in this area, of -- where

1 these definitions change over time. And I think that's  
2 the  
3 reason --

4 COMMISSIONER DOMBROWSKI: I think that gets to  
5 the heart of what we're talking about here, is we're --  
6 Barry, we're trying to get something set by the  
7 Commission in its powers to direct --

8 COMMISSIONER BROAD: No, and I -- and I -- and I  
9 agree with that. I'm just -- I just -- this vilifying of  
10 -- of the administration --

11 COMMISSIONER DOMBROWSKI: We're not trying to  
12 criticize -- it was not -- we're not out to criticize  
13 anybody.

14 MR. YOUNG: First off, Commissioner Lujan was  
15 just appointed. We're talking, in essence, of -- as the  
16 administration's gone over the past, you know, three or  
17 four decades. But it's not a particular criticism of any  
18 administration, and most particularly, this one.

19 So, as we continue to get the -- pick the fly  
20 specks out of the fly paper, we want to be, I mean, at  
21 least, in -- make sure that that wasn't our intent.

22 COMMISSIONER BROAD: Thank you.

23 COMMISSIONER DOMBROWSKI: Commissioner Bosco.

24 COMMISSIONER BOSCO: Well, I think the previous

1 discussion has mostly been about words, and they are  
2 important when making law. But let me try to pick your  
3 brain about the general overview of this whole subject.

4 I know that you've given us a few examples of  
5 who might now still be able to be considered a management  
6 employee, even though they do occasional other things, a  
7 manager that cleans up glass that's spilt by a customer,  
8 a CFO that does a few accounting things on the side. I  
9 can't believe that that has been the whole concern of the  
10 retailers or anyone else in doing this, because --

11 MS. THOMPSON: I'm sure --

12 COMMISSIONER BOSCO: -- I don't think anybody in  
13 this room cares if a manager cleans up glass, and nobody  
14 in the room thinks that that person should somehow be  
15 reclassified.

16 But what I'm concerned about are people that may  
17 be out there now who will be reclassified when this  
18 language gets approved, if it does, or, you know, people  
19 whose lives will change because of what we did here.  
20 Now, in your wildest imagination, Ms. Thompson -- I know  
21 you've practiced, as you say, for twenty years -- and say  
22 if I am taking the average department -- say Macy's -- I  
23 won't even say average -- say Macy's, and you look on the  
24 broad spectrum of people that are working there,

1 managers, sales clerks, stocking people, or whatever, is  
2 there going to be any change at all in how any of these  
3 people are classified after we've passed this regulation,  
4 if we do?

5 MS. THOMPSON: I don't think there should be. I  
6 think this -- I think we should be prepared to say -- you  
7 may want to say in the Statement of Basis that you  
8 believe that this is consistent with the current law.

9 COMMISSIONER BOSCO: Well, I -- no, I'm asking  
10 for you to --

11 MS. THOMPSON: Yeah.

12 COMMISSIONER BOSCO: -- go crazy and just think  
13 of any --

14 MS. THOMPSON: I don't think so. I mean, I  
15 can't speak to how Macy's has classified their managers,  
16 but --

17 COMMISSIONER BOSCO: Well, let me ask you  
18 another question. And this -- I know you're an attorney  
19 and you have a right to confidentially deal with your  
20 clients -- but in the many discussions, the hours of  
21 discussions that you and others have had on this subject  
22 -- I know you weren't just there worrying about cleaning  
23 up glass -- was there anything way down deep that you  
24 were thinking that maybe somebody's going to be able to

1 get paid less once this thing goes into effect, or the  
2 work hours are going to be able to be changed so  
3 management will be able to shave off and make a few --  
4 more profit? Was that ever a consideration?

5 MS. THOMPSON: Absolutely not.

6 (Laughter)

7 COMMISSIONER BOSCO: No, no, I'm -- no, go  
8 ahead. No, I'm not badgering you. I just --

9 MS. THOMPSON: Yeah. No.

10 COMMISSIONER BOSCO: So, in other words, you can  
11 truthfully say that your main intent here is to make  
12 state law uniform with federal law, make it easier for  
13 people to go do business in the 50 states, and that  
14 they're -- whether -- what about Burger King or the  
15 hamburger -- will there be anybody flipping burgers now  
16 that will suddenly get classified as a manager?

17 MS. THOMPSON: Absolutely not. I don't see  
18 there's any argument that flipping a burger is directly  
19 and closely related to managing Burger King. I -- you  
20 know, I think that is a red herring. And no one is going  
21 to contend that that is manager work.

22 I think this is a realistic, reasonable  
23 framework that should place into the record what is and  
24 should be -- what is now, or at least should be now, were



1 we all to understand it. I think this helps us  
2 understand.

3 COMMISSIONER BOSCO: And so you can't give me a  
4 single example of someone now working in the workforce  
5 and not classified as a manager that would be  
6 reclassified under this and thus become exempt from  
7 overtime.

8 MS. THOMPSON: Correct. I mean, I can tell you  
9 that I -- I personally will not be calling up my clients  
10 and saying, "Now let's go through your workforce, and we  
11 now have tools to reclassify your people." I -- I don't  
12 --

13 COMMISSIONER BOSCO: There won't be any  
14 bulletins put out from your law firm that --

15 MS. THOMPSON: I don't -- I don't think anybody  
16 is going to contend that, I really don't. I -- you know,  
17 that isn't what this does.

18 COMMISSIONER BOSCO: Okay. Thank you.

19 I'm going to ask the next panel the same  
20 questions, so I'm not just asking you.

21 COMMISSIONER DOMBROWSKI: Commissioner Rose.

22 MS. THOMPSON: Yeah.

23 COMMISSIONER BOSCO: Thank you.

24 COMMISSIONER ROSE: Yes, just briefly, and it

1 was already touched on. My concern is the lower paid  
2 people such as 7-11's, fast foods, gas stations, things  
3 like that. How do you envision this affecting them?

4 MS. THOMPSON: The lower paid people in the 7-  
5 11's and -- I'm sorry. Who are you --

6 COMMISSIONER ROSE: Like -- to me, the managers,  
7 the --

8 MS. THOMPSON: Oh, the managers. Well, I don't  
9 know. I mean, it depends on -- I would think, in most 7-  
10 11's, that they're not going to be spending more than  
11 half their time engaged in exempt work, because, when I  
12 go in there, there doesn't seem to be more than one  
13 person in the store. So, you know, but I don't know. I  
14 mean, I -- I would not think that the fact that you're in  
15 a small environment like that would help, under this  
16 standard, establish you as exempt. I think you would --  
17 you know, it sounds like you're going to be performing  
18 too much nonexempt work. And if you do, you're not going  
19 to be swept into the exemption by having a title or a set  
20 of responsibilities. I think it's -- that's very clear  
21 that none of that's changing.

22 COMMISSIONER ROSE: Thank you.

23 COMMISSIONER DOMBROWSKI: Any other questions?

24 (No response)

1 COMMISSIONER DOMBROWSKI: Thank you.

2 Mr. Rankin and Mr. Pulaski.

3 (Pause)

4 COMMISSIONER DOMBROWSKI: Whenever you're ready.

5 MR. PULASKI: Thank you. Chairman, members of  
6 the Commission, Art Pulaski, from the California Labor  
7 Federation.

8 With me on this panel is Tom Rankin, also with  
9 the California Labor Federation; Judy Perez, who's with  
10 the Communication Workers; Michael Zackos, from AFSCME,  
11 who is not in the room at the moment but here in the  
12 building and expected to come back; Marcie Berman, from  
13 the California Employment Lawyers Association; Patty  
14 Gates, from the Van Bourg law firm; and Laura Ho, from  
15 Saperstein law firm.

16 And we've asked some lawyers to come up because,  
17 obviously, this has gotten a little complicated in  
18 discussion here. And so they're going to give you some  
19 perspective on that as well.

20 If I may, I just will give some introductory  
21 comments and say that we are not the only working people  
22 in the room, on this panel here today. California  
23 workers have traveled today from around the state so that  
24 we can watch the watchdog agency that's charged with

1 protecting their interests.

2           We're here again because we have fought other  
3 proposals in these few short months that have come before  
4 this Commission, proposals with the intention to  
5 dismantle the protections of daily overtime that we  
6 fought so hard to reinstate through AB 60.

7           Let me just tell you that this was a rally cry  
8 for workers some two years ago when we began this fight  
9 to protect daily overtime when a previous governor took  
10 it away. It was a rally cry for us for the elections of  
11 November of 1998, where workers mobilized to go to the  
12 polling places. And a primary issue on their mind across  
13 this state was the protection and the reinstatement of  
14 their daily overtime.

15           As a candidate, Governor Gray Davis -- candidate  
16 then -- Gray Davis met with groups and groups of workers  
17 and established his commitment to assure that no workers  
18 who previously had daily overtime protections would be  
19 taken away. He must have made that commitment a hundred  
20 -- five hundred times. Yet the Commission that he  
21 appointed sits here seriously considering a proposal  
22 that, in fact, will do just that, take away the  
23 protection of daily overtime from what we might guess --  
24 and we can go back and do the research -- thousands upon

1 thousands, if not ten thousands, of workers.

2 And I must tell you that the proposal that I was  
3 given this morning to look at that was before you ended  
4 up

5 -- and I'm glad that we took a 15-minute break an hour  
6 and a half ago, because I learned then that the proposal  
7 I was given this morning was no longer the proposal  
8 before us. And so, we didn't even have, until the break  
9 an hour ago, what the real proposal was that you are  
10 considering before you now. And that's why we have these  
11 --

12 COMMISSIONER DOMBROWSKI: Well, wait. Excuse  
13 me. We put the proposal on the table first thing this  
14 morning. It's been there.

15 MR. PULASKI: Okay. Well, we -- Chairman, when  
16 we got together with the attorneys, we had the wrong  
17 document, because we assumed the document we were given  
18 earlier in the day was, in fact, the most recent one.  
19 So, something happened, perhaps overnight.

20 Oh, you ran out.

21 COMMISSIONER DOMBROWSKI: There's only one  
22 document.

23 MR. PULASKI: I guess there weren't any there  
24 when we went for the documents when we got here this

1 morning.

2 In any case, let me share with you, if I may,  
3 the law under AB 60, which says -- Paragraph (e) -- "For  
4 the purposes of this" law, quote, "`primarily' means more  
5 than one half of the employee's work time." This is very  
6 simple language.

7 And I must tell you that the debate that  
8 happened over the last hour by presumed learned people  
9 showed us how confusing this becomes for workers in the  
10 workplace whose purpose would be to try to protect and  
11 defend their interests, how hard it would be for them to  
12 try to debate with their managers over what rights they  
13 had and who was exempt and who was not, based on the kind  
14 of legal discussion that happened here today. If you  
15 pass this kind of Dombrowski proposal before you, you  
16 will violate the interests of protecting those workers in  
17 understanding how these exemptions affect them or do not  
18 affect them, because it will be so open -- so complicated  
19 that they will never be able to debate or stand up for  
20 their rights before their employers.

21 I just want to share with you one thing that so  
22 quickly came to my attention, because I didn't even have  
23 a chance to read the whole thing, and it is on -- halfway  
24 down Page 1, where it says -- it refers to the exemption

1 as "who are customarily and regularly exercising" --  
2 "exercises discretionary powers." And this was brought  
3 up earlier by Commissioner Broad. The language in the  
4 past that we had was "discretionary" -- "exercising of  
5 discretionary powers and independent judgment." We have  
6 many, many workers in this state who understand that they  
7 are told by their employers that they don't get the wages  
8 of a manager because they aren't allowed to utilize  
9 independent judgment. That's why you're relegated to be  
10 a worker. And that's why, as a worker, you're entitled  
11 to daily overtime.

12           However, interestingly enough, the language  
13 referring to independent judgment, language that's so  
14 often used to relegate workers to non-management status  
15 for lower wages suddenly disappears, in terms of the  
16 protection of their interests, of daily overtime.

17           So, I've got some other comments but I realize  
18 that I've probably gone over what should be introductory  
19 comments in terms of time. And let me just conclude my  
20 introduction by saying that this proposal before us  
21 violates our understanding of a commitment of our  
22 governor, it violates the full intention of AB 60 and our  
23 new law, it violates our sensibilities as workers, and it  
24 violates our trust in the responsibilities of the

1 administration of this state to implement the law based  
2 on its commitment and the law based on its language.

3 Thank you very much.

4 (Applause)

5 MR. RANKIN: Tom Rankin, California Labor  
6 Federation.

7 I was one of the participants in what now is  
8 becoming the infamous meeting in John Burton's office. I  
9 think his name has been taken in vain I don't know how  
10 many times here.

11 My understanding of that meeting was not that  
12 the results of putting the language that was agreed to be  
13 put in the statute, which was, "The Commission shall  
14 conduct a review of the duties which may meet the test  
15 of" -- "which meet the test of the exemption. The  
16 Commission may, based upon this review," et cetera, et  
17 cetera. You're not required to do anything. And quite  
18 frankly, we'd be very happy to live with the law and what  
19 was in the wage orders that corresponds with that law,  
20 rather than trying to somehow "clarify." You're just --  
21 you're not clarifying; you're confusing what has been a  
22 practice for many years in this state.

23 You've got to look at that language in  
24 conjunction -- in the context of what was done in AB 60.



1 In AB 60, you strengthened the protections -- the  
2 Legislature strengthened the protections in this area.  
3 They increased the requirement -- the salary requirement  
4 to be a manager. You now have to make a whole two times  
5 the minimum wage, which is not -- we originally had three  
6 times, and that was part of the negotiations. We went  
7 down to two times from three times. We put in the  
8 "primarily engaged in" phrase into the law. Before, it  
9 had only been in the IWC orders. It seems pretty clear  
10 that what the Legislature wanted and the Governor signed  
11 was to further employee rights in this area, not to  
12 denigrate them and lessen them.

13 We have no problem if you can come up with  
14 language that clarifies this whole issue of who's a  
15 manager and who isn't within the framework of the law.  
16 But that's not what you're talking about doing here.  
17 You're really trying -- it's very clear from the  
18 testimony here you're trying to import federal standards.  
19 Some federal standards are used by the Labor Commissioner  
20 in California. And I wish the Labor Commissioner would  
21 be allowed to come up here and testify to that. But you  
22 are not to import federal standards that lessen  
23 protections of workers.

24 We fought off the employers on this issue for

1 sixteen years of Republicans. And are we going to lose  
2 it now with this Industrial Welfare Commission? I hope  
3 not.

4 We have some attorneys here who can testify to  
5 the details of this proposal.

6 MR. PULASKI: Chairman, we have the author of AB  
7 60, who has asked to come forward. And I would -- he has  
8 a short period of time, so we would ask that we allow him  
9 an opportunity to say a few words.

10 Assemblyman Wally Knox.

11 (Applause)

12 ASSEMBLYMAN KNOX: Thank you, Mr. Chairman.  
13 Thank you, members, for affording me the courtesy of  
14 making some brief comments. I apologize for coming late.  
15 We've been attending the Governor's signing ceremony for  
16 the state budget, and it threw my schedule quite off.

17 And I must apologize also for not being able to  
18 completely address myself to the proposal because I've  
19 not been able to review some of the relevant federal  
20 regulations and statutes. But it's quite important for  
21 me to come here today and to give you the perspective of  
22 the author of the bill.

23 And let me quickly say that this is a bill that  
24 had quite a history to it. This is a single bill,

1 presented to Governor Gray Davis at close to the end of  
2 the first year he was in office, that had a five-year  
3 genesis. This is a bill that was conceived and discussed  
4 and worked on by myself and Tom Rankin and others  
5 throughout the State of California over many, many years.  
6 Its provisions were not lightly drawn. And when we came  
7 to the point of, prior to the tenure of Governor Davis,  
8 bringing a bill to the desk of the prior governor, we put  
9 in a full year of work on the text of that bill as well.

10 So, what you see before you in the form of AB 60  
11 is quite a document indeed. It is not one of those bills  
12 that is assembled in the last 30 or 60 or 90 days of the  
13 legislative session. It was vetted and thought out quite  
14 carefully.

15 And I must strongly second my good friend Tom  
16 Rankin's general observations on the thrust of the bill,  
17 in particular with regard to the "primarily engaged"  
18 language. What we very clearly wanted to do was to  
19 elevate to the statutory level what had been primarily  
20 regulatory prior to that time.

21 And let me impress on this body how important  
22 that was, for a reason that may be a little bit difficult  
23 to explain. And it is this: in the original drafts of  
24 the bill, we attempted to import a great deal of

1 regulatory language into the statute itself. And in the  
2 course of the legislative process, much of that  
3 regulatory language did not make it into the text of AB  
4 60. Now, if I were a good labor attorney, I would argue  
5 that that has a certain bearing on the intent of the  
6 legislation.

7 But what I'd point out to you is the "primarily  
8 engaged" language, some of the most significant language  
9 ever to appear in regulatory context, survived that  
10 entire process, was embraced by the Governor of the State  
11 of California, and is part of the document in front of  
12 you today. It was the intent of the author, in  
13 fashioning that legislation, very clearly to say we are,  
14 in this legislative document, the statutory document  
15 itself, accommodating the whole question of what work is  
16 exempt and what work is not exempt in the instance where  
17 a worker is engaged in work that is both exempt and not  
18 exempt. And our accommodation, statutorily embraced, is  
19 the "primarily engaged" definition. That was the  
20 keystone compromise in that area.

21 The philosophy underlying that, then, would be  
22 to say that to further dilute that, in any one of a  
23 number of different mechanisms, would fly against the  
24 intent of the legislation, the accommodation was struck

1 in the statute, and that to further dilute the "primarily  
2 engaged" definition could severely undercut what the  
3 Legislature and the Governor saw as the way to erect a  
4 wall between clearly fully exempt occupations and those  
5 which were not.

6           What this means to me is, without reviewing in  
7 detail the federal legislation and in detail what the  
8 mechanisms are there, to predicate exempt status on those  
9 federal -- on those federal pieces of regulation could  
10 jeopardize the accommodation we thought we had made in  
11 the final bill itself. That is why I am here today in  
12 support of Commissioner Broad's language, which I believe  
13 does a much better job of addressing what the intent of  
14 the Legislature was with regard to how to handle the  
15 managerial exemption in general, and the "primarily  
16 engaged" definition in itself, which is one of the most  
17 crucial.

18           And that's the primary message I came here today  
19 to deliver. I have a little bit of time available.

20           COMMISSIONER DOMBROWSKI: Any questions?

21           (No response)

22           COMMISSIONER DOMBROWSKI: Thank you.

23           ASSEMBLYMAN KNOX: Okay. I want to thank the  
24 Commission. I want to apologize again for arriving late

1 and leaving early. It's a way of life that I don't  
2 particularly enjoy, but --

3 COMMISSIONER DOMBROWSKI: There's a couple other  
4 people in the room who would like to be able to do what  
5 you're doing too.

6 (Laughter)

7 ASSEMBLYMAN KNOX: It's a pleasure being before  
8 this body.

9 (Applause)

10 MS. PEREZ: Yeah. I am Judy Perez, with the  
11 Communication Workers of America. I spoke at one of your  
12 previous meetings. So as not to be redundant, I'll be  
13 very brief.

14 We are opposed to any changes in the 8-hour day  
15 and opposed to any changes in employee status that can  
16 result in a loss of their overtime pay. Our members are  
17 not managers at the companies. If they were, I would not  
18 be here today. And therefore, they should not be  
19 exempted from overtime pay for their hours worked.

20 Our 75,000 membership are outraged that this  
21 issue that continually attacks their overtime is ongoing.  
22 I urge you to vote down the Dombrowski language and  
23 support the Broad language.

24 Thank you.

1           MS. BERMAN: My name is Marcie Berman, and I'm  
2 here on behalf of the California Employment Lawyers  
3 Association.

4           I'm just going to go through the Dombrowski  
5 proposal and try to quickly explain the things about it  
6 that I think are illegal or not a good idea, even if  
7 they're not illegal. I want to say that about 90 percent  
8 of it is fine, and those parts of it, that 90 percent of  
9 it that's fine, are the parts of it that are identical to  
10 the Broad proposal, which is 100 percent fine.

11           Here's the first problem. If you look at the  
12 first sentence of A(1), defining the executive exemption,  
13 it says: "A person employed in an executive capacity  
14 means any employee whose duties and responsibilities  
15 involve the management of the enterprise." Well,  
16 "involve," I guess, could mean that you spend 5 percent  
17 doing it and the -- rest of the 95 percent of your time  
18 sweeping the floors. That's not okay. That violates the  
19 "primarily engaged" standard.

20           Now, I realize that once you go all the way down  
21 to Number (5), it talks about "primarily engaged in  
22 duties which meet the test of the exemption." Well, if  
23 I'm either an employer or an employee reading this thing  
24 on a poster in the lunchroom, I'm going to be real

1 confused. And there's no policy reason or logical reason  
2 to do it this way. The reasonable and logical way to do  
3 it is to have, in Number (1), say, "Whose duties and  
4 responsibilities are such that that the person is  
5 primarily engaged in the management of the enterprise."  
6 So, I'm wondering why it is this way. It's patently  
7 confusing, at best.

8           Moving on. Number (4), A(4), "Who customarily  
9 and regularly exercises discretionary powers." Now,  
10 we've already had discussion about the fact that this is  
11 a change from what the IWC has had in all of its wage  
12 orders since 1947. And last time I was here, I even  
13 brought you guys copies of all the Wage Order 4's from  
14 1947 having that language. So, you've got that in your  
15 record.

16           Now, let me tell you what the -- you know, I  
17 understand that the retail industry's ostensible  
18 objective is to provide clarity. And it's true that the  
19 federal regulations provide a lot of verbiage, and it is  
20 helpful to everybody involved to know what things mean.  
21 So, let me tell you what the federal regulations say  
22 about that language: "A person whose work is so  
23 completely routinized that he has no discretion does not  
24 qualify for the exemption." But it doesn't tell you what



1 "discretion" means; it's a circular definition. That's  
2 it, that one sentence.

3           Let me tell you -- let me just show you how much  
4 verbiage there is in the federal regulations about  
5 discretion and independent judgment, which is what all  
6 the IWC orders since 1947 have always used for the  
7 executive exemption. It starts here, goes for almost an  
8 entire page in minuscule print, goes for another entire  
9 page in minuscule print, and another column. It's a huge  
10 definition. It's extremely helpful. It's very evenly  
11 balanced. And I don't see any policy reason to change  
12 that to something which has a one-sentence circular  
13 definition in the federal regs and is a change from  
14 what's always been done.

15           Okay. Here's my next problem. In A, Subsection  
16 (5), there's a list of federal regulations that are to be  
17 used to construe the executive exemption. In and amongst  
18 that list is Section 541.110. And that's the section  
19 dealing with occasional duties. Now, it seems to me  
20 patently clear that just because you sweep the floors  
21 occasionally doesn't mean that what you're doing isn't  
22 sweeping floors. Sweeping floors is a nonexempt  
23 activity. And the fact that you do it once in a while  
24 doesn't make it exempt. You know, an elephant is not a

1 giraffe. And just because a giraffe cruises through the  
2 forest only once a week or once a month doesn't convert  
3 that giraffe into an elephant. It's illegal. It  
4 violates AB 60. I just think it's as clear as can be.

5 I also want to say that if it were something  
6 that only comes up once in a while, it wouldn't --  
7 there's no reason why it would be that important to the  
8 retail industry. But the fact that is so important, I  
9 think, is significant here. I think that something could  
10 be done once in a while, and another thing could be done  
11 once in a while, and another thing can be done once in a  
12 while, and you add all those things up that are done once  
13 in a while, and bingo, that person is suddenly exempt.  
14 You know, Monday the person could be spending 5 hours  
15 cleaning glass; Tuesday that person could be spending 5  
16 hours cleaning inventory; Wednesday that person could be  
17 spending 5 hours checking off a bill of lading, counting  
18 up all the stuff that came in the boxes to make sure it's  
19 consistent with what was supposed to be delivered;  
20 Thursday that person could be unloading that stock for 5  
21 hours; Friday that person could be going through the  
22 compost heap and making sure that the workers didn't  
23 throw away bananas that could still be sold. You add it  
24 up, you've got a person who's exempt all of the sudden,

1 because each of those things is only done once a week, so  
2 maybe that means that they're only occasional.

3 And I did actually do computer research to see  
4 what the courts have said that that section means. And  
5 lo and behold, there's not a single reported case that's  
6 ever interpreted it. So, I think it is subject to abuse,  
7 in just the way that I've said.

8 And I'm really not exaggerating, because I  
9 personally am aware of a case, a class action lawsuit  
10 against a big supermarket chain, involving produce  
11 department managers, where one of the arguments that the  
12 employer made was that an exempt duty, one of the litany  
13 of exempt duties, was, quote, "analyzing compost." And  
14 employers will make whatever arguments they can to try  
15 and bootstrap patently nonexempt duties to add up to more  
16 than 50 percent.

17 I just want to echo what Commissioner Broad said  
18 about this language in the *Ramirez* case. This is not  
19 faithful to the language and it's inappropriate. That  
20 language in *Ramirez* dealt with an evidentiary issue that  
21 was a narrow issue in that case. It's not something  
22 that's appropriate to even put in the regulation. And  
23 this misrepresents what the Supreme Court said. And it  
24 is what it is; it's the law. The Supreme Court made a

1 ruling, it's a published decision. There's no reason for  
2 the IWC to have to put that in its wage order. You're  
3 not creating law here. It exists independently from what  
4 you do. So, it's unnecessary, in any event.

5 With respect to the administrative exemption,  
6 other than the repeating boilerplate that I've already  
7 addressed, I don't have any comments about.

8 With respect to the professional exemption, I  
9 just -- I'm very concerned that the list of enumerated  
10 licensed professions that's been in California law for as  
11 long as I'm aware of is now gone.

12 And a statement was made that the DLSE's manual  
13 relies on these same provisions of the federal  
14 regulations that are listed in here. And that's actually  
15 not accurate. There are -- I'm just going to cite to it  
16 -- Page 104 of the Division of Labor Standards  
17 Enforcement "Policies and Interpretations Manual" of  
18 October, 1998, does list a few prescribed provisions of  
19 the federal regulations, but certainly not all the ones  
20 that are listed here. And there are some bad ones; in  
21 particular, 541.301(e), (f), and (g) talk about various  
22 kinds of workers that would absolutely not be considered  
23 exempt under current California law but are potentially  
24 exempt under the federal regulations. So, that would be

1 a big change, and it would be exacerbated if you take out  
2 the list of enumerated licensed professions that you have  
3 now.

4           And lastly, there's some language in the middle  
5 of Page 3, under Subsection (4), that I think -- well, I  
6 would say is preempted by federal law. It says that the  
7 work shall include, for example, "all work that is  
8 directly and closely related to exempt work." Actually,  
9 the federal law, in Section 541.307 of the regulations,  
10 says that for professional employees, it has to be work,  
11 quote, "essential" -- that is, quote, "an essential part  
12 of and necessarily incident to" the exempt work. And  
13 because California law is not allowed to go below the  
14 floor of federal law, under Section 218(a) of the FLSA,  
15 this would violate that. It would be preempted by  
16 federal law.

17           You know, I think it's a -- to say that it's  
18 confusing to pick away at the federal definition and just  
19 take some and not take all of it is -- I don't know why  
20 that would be so. Even Mr. Dombrowski's proposal takes  
21 just some, but not all. And I think here there's no  
22 reason on earth why you can't omit the federal -- the  
23 particular federal regulations that violate California  
24 law.

1           And that's it.

2           MS. HO: My name is Laura Ho. I'm from the law  
3 firm of Saperstein, Goldstein, Demchak, and Baller.  
4 We're a public interest class action law firm, and in the  
5 last few years we've been involved in many cases  
6 representing workers seeking overtime compensation.  
7 These are all misclassification cases, where the employer  
8 has improperly classified them as managerial or  
9 administrative employees when, in fact, under California  
10 law, they should be paid overtime because they are  
11 nonexempt.

12           I agree with everything that Marcie has said  
13 about the illegality of many of these provisions. I want  
14 to just point out two other things.

15           In -- under the executive exemption, A(5), there  
16 just is completely unnecessary and confusing language  
17 listed after the regulations that says, "All work that is  
18 directly and closely related to exempt work" -- that's --  
19 I'm not saying that is -- right after that, it says,  
20 "properly viewed as a means for carrying out exempt  
21 functions." There's no reason for that language, and  
22 it's completely confusing. What does that mean, and what  
23 can it sweep in? It's just not -- not necessary, and  
24 it's not part of federal law, much less state law.

1           And then, under the administrative exemption,  
2   (1)B, again, that's "the performance of functions in  
3   administration of a school system or educational  
4   establishment or institution," and it goes on, "and work  
5   directly related to the academic instruction or training  
6   carried on therein." It sounds like a teacher to me. I  
7   don't know why a teacher would be exempt under the  
8   administrative exemption.

9           The other thing that I just want to address is  
10   the question of who would become -- who might become or  
11   who employers will try to make into managers. Like I was  
12   saying, the people that we represent in cases against --  
13   in just some of the cases that we've worked on -- are  
14   classified -- were classified as assistant managers at  
15   Enterprise Rent-a-Car, Rent-a-Center, the furniture  
16   outlet, there are salespeople at First Plus Financial and  
17   the Money Store, here in Sacramento. And these assistant  
18   managers were working at the cash registers, washing  
19   cars, delivering furniture. Clearly, under either the  
20   federal or state law, they are -- they are not exempt.

21           But what the employers are going to get with  
22   this new, revised wage order, it's just an additional  
23   tool to argue why such people who are making \$29,000,  
24   \$30,000 a year and working 60 hours a week shouldn't be

1 paid any more for their work. Sometimes they're working  
2 even up to 70 hours, and they're making \$29,000 a year.

3 So, I just want to emphasize that this is not  
4 about Macy's managers sweeping up glass. This could very  
5 well affect very low-paid workers who are working  
6 extremely long hours and not getting paid overtime.

7 MS. GATES: My name is Patty Gates, and I'm with  
8 the law offices of Van Bourg, Weinberg, Roger, and  
9 Rosenfeld.

10 And I've been here before the Commission before  
11 to testify, most recently in February, when this  
12 Commission had on its noticed agenda the topic and the  
13 definition of outside salesperson. At that time, I  
14 brought the *Ramirez* case to this Commission and asked the  
15 Commission to consider and drafted, in fact, language  
16 characterizing the holding in the *Ramirez* decision. And  
17 at that time, at the following -- if you all remember, at  
18 the following Commission meeting, members of the  
19 industry, industry lawyers, really, offered other  
20 language. And at that time, this Commission, even when  
21 the topic was outside salesperson, which is the topic of  
22 the Supreme Court decision in *Ramirez*, even at that time,  
23 this Commission decided adopting any lawyer's  
24 characterization of a holding of a Supreme Court case was



1 not a good idea. And the idea was -- and as a matter of  
2 fact, it was dropped at that time.

3 So, to actually consider, based on a business  
4 and industry lawyer's testimony before you, that this  
5 language that comes out of *Ramirez*, or that allegedly  
6 comes out of *Ramirez* --

7 "The work actually performed by the employee  
8 during the course of the workweek must, first  
9 and foremost, be examined in the amount of time  
10 the employee spends on such work, together with  
11 the employer's realistic expectations and the  
12 realistic requirements of the job, shall be  
13 considered in determining whether the employee  
14 satisfies this requirement."

15 -- first of all, it makes this regulation into a lawyer's  
16 document and it adopts one, and that is a business  
17 lawyer's, point of view about what the *Ramirez* case says.  
18 And the *Ramirez* case, as Commissioner Broad has already  
19 pointed out, was on the narrow subject of the exemption  
20 for outside salesperson. So, to import the language or  
21 to even consider doing that now, when you're actually  
22 trying to elaborate on and define the "primarily engaged  
23 in" test, would be entirely inappropriate.

24 And that -- my concern in general about this

1 document, I support Commissioner Broad's proposal before  
2 this Commission, and I concur in what the other lawyers  
3 have testified on this panel about the legality of this  
4 proposed language. But more importantly, I feel very  
5 concerned that this regulation is a lawyer's document,  
6 not a people's document. I think that it is -- the  
7 language that's been added here is way too complicated.  
8 This Commission has to think in terms of a posted order  
9 in a workplace and the ability of a person working in a  
10 workplace to interpret that language.

11 Not only should this language concerning the  
12 dilution of the "primarily engaged in" test be deleted,  
13 and the "independent judgment" be brought back in, but  
14 this language that purports to summarize a Supreme Court  
15 case on another topic does not belong in here.

16 And finally, if you -- if this Commission  
17 decides to refer to federal regulations, the text of  
18 those regulations should be posted, just to honor those  
19 people in the workplace who try to understand their  
20 rights.

21 Thank you.

22 COMMISSIONER DOMBROWSKI: I would just like to  
23 say, on that sentence on the *Ramirez*, that I've worked  
24 very hard over the last 24 to 48 hours with the Attorney

1 General's Office trying to get it so that it is a fair  
2 representation, understanding that in our Statement of  
3 Basis we are also going to be referencing *Ramirez*. So,  
4 it's not like it's language that we haven't reviewed.

5 COMMISSIONER BROAD: We haven't voted yet, Mr.  
6 Chairman. I --

7 COMMISSIONER DOMBROWSKI: I'm just -- I'm not  
8 trying to make it sound -- I'm just trying to say about  
9 the sentence and where it was --

10 COMMISSIONER BOSCO: May I --

11 COMMISSIONER DOMBROWSKI: Sure.

12 COMMISSIONER BOSCO: I'm a little bit confused  
13 as to all the parties here, because I certainly  
14 understand when management comes up, and then Mr. Rankin  
15 and Mr. Pulaski, who, for a long time, have represented  
16 labor, but it seems like some of the other people here  
17 are not only lawyers who bring lawsuits on all this, but,  
18 in one case, a lawyer who represents all the other  
19 lawyers who bring lawsuits. So -- and then we get a  
20 complaint that this looks like a lawyer's document.  
21 Well, I mean, I have no doubt that whether it's Mr.  
22 Broad's rendition or Mr. Dombrowski's rendition or the  
23 existing regulations, that it will certainly be lawyers'  
24 documents no matter what we do.

1           But I am going to go back to the question I  
2 asked before. And I think maybe one of the attorneys  
3 could answer this.

4           Would you please give me an example of someone,  
5 a real person out there in the workplace right now, who  
6 will suddenly, if we enact Mr. Dombrowski's proposal, end  
7 up going from being an ordinary worker that's entitled to  
8 overtime to a manager who is not entitled to overtime?  
9 Can you tell me who that will be?

10           MS. BERMAN: Well, I can tell you that this  
11 language is subject to -- some of this language that's  
12 particularly vague and ambiguous is subject to  
13 interpretation that may well be used by employers and may  
14 well be, you know, then agreed upon by a court. I'm not  
15 going to tell you what the language is going to do.

16           But, yes, let me answer your question with that  
17 caveat. For example, this language that's in A(5) and in  
18 all the comparable sections that use that same verbiage,  
19 it says "work which is properly as a means for carrying  
20 out exempt functions." Okay. Now, at the last meeting,  
21 Ms. Thompson or Mr. Young used an example, which they  
22 said was what they were intending to address, of a  
23 manager who's drafting a legitimately managerial type  
24 policy and he's drafting it on a computer himself. Now,

1 if somebody who wasn't a manager was typing something  
2 that a manager had given that person to type, their  
3 typing time would be nonexempt time. But because the  
4 manager is doing the typing himself, he's merely using  
5 that typewriter or PC as an instrumentality to carry out  
6 that exempt function of drafting a legitimately  
7 managerial type policy.

8 COMMISSIONER DOMBROWSKI: But --

9 MS. BERMAN: Okay. Now, let me tell you that  
10 that's not a problem. That makes perfect sense.

11 But here, this language says -- is broad and  
12 vague enough so that it can go way beyond those kinds of  
13 situations. For example, I can easily see somebody from  
14 -- you know, a restaurant attorney, saying that the  
15 assistant manager who's spending 6 hours of the day going  
16 around and pouring coffee for customers and saying,  
17 "Would you like more coffee? How was your service?"  
18 could say, "Well, that 6 hours of time is a means for  
19 carrying out the exempt function of supervising.

20 COMMISSIONER DOMBROWSKI: Excuse me. Marcie,  
21 excuse me, please. That's related to the previous  
22 language, "all work that is directly and closely related  
23 to exempt work and work which is properly viewed as a  
24 means." It's a connecting phrase. And we've talked

1 about this. And the examples that we're talking about  
2 there are the manager doing the computer, is the manager  
3 driving to do the deposition or whatever it is. I mean,  
4 those are the situations that that is solely looking at.

5 MS. BERMAN: Well, then, they should say that.  
6 That's okay.

7 COMMISSIONER DOMBROWSKI: It's not looking at --  
8 we are saying that, and we will be saying that in the  
9 Statement as to Basis. That is not -- there is no way  
10 anybody pouring coffee 6 hours is classified as a  
11 manager.

12 MS. BERMAN: But that's exactly what the  
13 attorneys for these restaurants are saying now, under  
14 current law, actually.

15 COMMISSIONER DOMBROWSKI: I don't care what the  
16 attorneys for restaurants are saying, because what I'm  
17 saying is when we do --

18 MS. BERMAN: Well, that's who drafted this.

19 COMMISSIONER DOMBROWSKI: -- when we do the  
20 Statement as to Basis, this is going to make it very  
21 clear that we're referring to examples that are directly  
22 and closely related to managing.

23 MS. BERMAN: Well, I answered your question.

24 COMMISSIONER BOSCO: Let me ask --

1           MR. PULASKI: Mr. Chairman, if I may, when the  
2 question was first asked, I had a couple of notes passed  
3 up to me from some people who are back in the room who  
4 would like to respond to that question. They're not  
5 lawyers, they're not attorneys. So I would ask them to  
6 come forward to begin to respond to that. And if you  
7 want more, we have a lot more people in the back of the  
8 room and we can create a line.

9           But let me say this first, and that is, isn't it  
10 ironic that we find that the people who opposed the  
11 reinstatement of daily -- daily labor -- daily overtime  
12 law in this state, the people who opposed that come  
13 forward with language that is different from that which  
14 we intended and is now part of the proposal before you  
15 for the implementation of daily overtime is indeed ironic  
16 to me.

17           I would like to bring forward those people.

18           COMMISSIONER DOMBROWSKI: Excuse me. Excuse me.  
19 I was in support of AB 60.

20           MR. PULASKI: Chairman, I meant the lawyers that  
21 came up, who were obviously responsible for the language,  
22 representing the proposal.

23           COMMISSIONER DOMBROWSKI: They're representing  
24 me.

1 COMMISSIONER BOSCO: I don't know if we need --

2 MR. RANKIN: Well, I think it's very important,  
3 because we will -- we will specifically answer your  
4 question, Mr. Bosco, about who is in danger of losing  
5 their overtime because of this change in definition of  
6 who is a manager, from practical, day-to-day experience.

7 MR. PULASKI: If you think it -- if you think  
8 it's an important question, then it's important for us to  
9 answer the question.

10 MS. BERMAN: Yeah.

11 COMMISSIONER BOSCO: Okay.

12 MS. BERMAN: And I can also give additional  
13 examples.

14 MR. PULASKI: Give examples. What examples?

15 MS. BERMAN: Well, first -- I'll give you a  
16 couple of examples. I've already mentioned them with  
17 respect to the professional exemption.

18 The federal regulation portions that are  
19 included in here, which are 541.301(f) and (g), and  
20 probably others, talk about people who, under current  
21 law, would not be exempt, but are given as examples of  
22 people who might be exempt under the federal law.

23 COMMISSIONER BROAD: Excuse me. I think Mr.  
24 Bosco wants a more generic answer. What types of people



1 are we talking about here? Not a theoretical example. I  
2 mean, we -- you know, who is the -- what is the range of  
3 concern? And I think that's a legitimate question.

4 COMMISSIONER BOSCO: Well, may I ask this too,  
5 maybe get this point over with, at least in my own mind?  
6 There was, as I understand it, an existing enumeration of  
7 some of the -- some of the professions that Mr.  
8 Dombrowski's rendition has eliminated, at least in terms  
9 of enumerating them. Is there any reason we can't  
10 maintain the enumeration of these professions?

11 COMMISSIONER DOMBROWSKI: No. If you want to,  
12 we can amend it and put that in.

13 COMMISSIONER BOSCO: Well, why don't we just do  
14 that? And that will at least eliminate that aspect of  
15 it.

16 COMMISSIONER DOMBROWSKI: Okay.

17 COMMISSIONER COLEMAN: And also, I think part of  
18 the question here too is sort of what's the overall  
19 impact of this. And I think that's sort of what we're  
20 hoping the witnesses will comment on. Is this -- is this  
21 zero or a lot?

22 COMMISSIONER BOSCO: We have two would-be  
23 managers here, I guess.

24 MR. BRANDEN: Okay. The business group was

1 talking about machinists -- oh, my name is Tom Branden.  
2 I'm a union rep for the Machinists Union, District Lodge  
3 190.

4 Thank you.

5 You're talking about a machine shop and a  
6 manager doing bargaining unit work. Well, actually, it  
7 would be the opposite way around. The manager would have  
8 lead people do more managerial tasks and then be exempt  
9 from the law, because if they -- if lead people are doing  
10 30 percent of managerial skills right now, they would  
11 then be forced to do 20 to -- 20 to 40, 50 percent more,  
12 and then be exempt. And that's what we're worried about,  
13 is not a manager doing bargaining unit work, but the  
14 opposite, our members having to do more managerial skills  
15 and then be exempt from the law.

16 COMMISSIONER DOMBROWSKI: Then you would qualify  
17 under the 50 percent rule. If you're then doing exempt  
18 work more than 50 percent of the time, you are a manager.

19 (Audience murmuring)

20 MR. BRANDEN: If -- right, and that's exactly  
21 the -- but they're going -- so you're asking how many  
22 more people would be brought into exemption.

23 COMMISSIONER DOMBROWSKI: How would they do  
24 that.

1           MR. BRANDEN: In one shop in Petaluma,  
2 California, we have 12 lead people. Okay. They do maybe  
3 30 percent managerial jobs. If they were forced to do  
4 more by management -- I'm not saying this company would  
5 do that, but some companies may do that -- force them to  
6 work another 20 percent in managerial skills, so they  
7 would be exempt from the overtime.

8           COMMISSIONER BOSCO: But they would have to meet  
9 all the other criteria as well.

10          MR. BRANDEN: Well, they get -- they're making  
11 \$22 an hour, so they're going -- they're over the two  
12 times minimum wage. That's -- they're making 10 percent  
13 above a journeyman, so that's --

14          COMMISSIONER BOSCO: But there's other standards  
15 in the law that they would have to meet.

16          MR. BRANDEN: If they were --

17          COMMISSIONER BOSCO: They wouldn't just simply  
18 then be doing the mechanical work. They would be doing  
19 management work.

20          MR. RANKIN: They are -- Mr. Bosco, I think a  
21 lot of people are already -- the real classification here  
22 is like assistant manager, lead person. They're already  
23 clearly doing some management work. What this definition  
24 allows is, where they may be doing, say, 55 percent

1 nonexempt work, now you have the ability to pick out,  
2 "Oh, this occasion plus this occasion plus this occasion,  
3 oh, that brings them up to 51 percent management work."  
4 That's the problem.

5 COMMISSIONER DOMBROWSKI: Okay.

6 COMMISSIONER BOSCO: Well, that isn't my  
7 understanding of it.

8 MR. RANKIN: That's exactly what it does.

9 MR. HUNSUCKER: Mr. Chairman, I'm Don Hunsucker.  
10 I'm president of the United Food and Commercial Workers  
11 Union, who represents the retail industry, represents  
12 truck drivers, represents poultry and meat division  
13 workers.

14 Let me tell you what -- and I'll tell you from  
15 an example, because I used to work in the retail industry  
16 as a clerk. Okay? In the retail industry in these large  
17 stores, and even small stores, everyone in the world is  
18 given a title. You have a department manager, you have a  
19 produce manager, you have a poultry manager, and all  
20 these individuals. Right now they get overtime. And the  
21 change in the law that you are going to do now, with some  
22 different interpretations, those people are going to lose  
23 their overtime. They're going to lose.

24 You're not talking about a few people. You're

1 talking about thousands of people. We have poultry  
2 plants right now that we have individuals that are called  
3 supervisors. They get overtime. They get overtime. Let  
4 me tell you what. Under the provisions, if we do not  
5 support or get Barry Broad's amendments to this, we're  
6 going to lose that overtime for those individuals. I  
7 just want you to remember that, because that's exactly  
8 what's going to happen.

9 COMMISSIONER DOMBROWSKI: Can I -- I want to  
10 clarify something here. I want to clarify something  
11 here. Both my proposal and, I believe, Barry's proposal  
12 recognize the "closely and related" duties aspect.  
13 Neither one is different in that regard. What we're  
14 trying to do in my proposal is to get some conformity in  
15 the duties that makes sense, since they are the duties  
16 that are listed in the federal and they have a history of  
17 interpretation. That's all we're trying to do. We are  
18 not changing the 51 percent. Neither of us, I think, are  
19 opening up some door to large, quote, "interpretation" of  
20 activities being classified as exempt. It just is -- I  
21 think that's a misrepresentation of both my proposal and,  
22 I believe, Barry's proposal.

23 MR. HUNSUCKER: Mr. -- I'd like to say one  
24 thing. Mr. Chairman, I believe the intent of both

1 individuals -- you may be right. But in the real world,  
2 out there in the stores or out there in the plants, who's  
3 going to interpret that but the supervisors or the  
4 companies who own them? And let me tell you what. I've  
5 worked with those companies. They see this as a major  
6 change that they can take away overtime for individuals.  
7 And let me tell you what. If they didn't believe that,  
8 they wouldn't be up here trying to change it.

9 COMMISSIONER DOMBROWSKI: I respectfully  
10 disagree. I'm sorry.

11 MR. RANKIN: If we didn't believe that, we  
12 wouldn't have all these people here.

13 (Applause and cheering)

14 COMMISSIONER BOSCO: Can I ask a question? I  
15 think one of the important points that's been raised is  
16 this question of occasional. And I'm going to  
17 characterize it -- can occasional be cumulative? In  
18 other words, my -- my understanding of what Mr.  
19 Dombrowski's intent is is to say occasional to mean that  
20 a manager can only do occasional nonexempt duties,  
21 otherwise lose the management characteristic of his or  
22 her job.

23 But what other people are saying here is that  
24 employers who want to improperly classify ordinary

1 workers as managers will give them an occasional job  
2 here, an occasional job there, an occasional job here, an  
3 occasional job there, and all these nonexempt occasions  
4 will add up to -- to an injustice, so to speak. How can  
5 we prevent that from happening?

6 COMMISSIONER BROAD: Well, Mr. Chairman, that's  
7 what -- that's what the statute does. It just says when  
8 that stuff gets to 50 percent, you're not exempt.

9 COMMISSIONER BOSCO: Well, if --

10 COMMISSIONER BROAD: And the federal test --  
11 just let me -- the federal test is a primary duty test.  
12 So you're looking -- you're saying that the person is  
13 called a manager and their primary duty is managing. And  
14 so then they say, well, if you do an occasional non-  
15 managerial activity, as long as you don't do too much of  
16 it, you're still a manager. So they -- so they have a  
17 sort of mathematical equation, but it isn't our statutory  
18 equation.

19 COMMISSIONER BOSCO: But it's as long as you  
20 don't do too much of it --

21 COMMISSIONER BROAD: Right. And that's what  
22 our --

23 COMMISSIONER BOSCO: -- the cumulative effect --

24 COMMISSIONER BROAD: And that's what our

1 "primarily engaged" test encompasses. It's very simple.  
2 And that's what was codified.

3 COMMISSIONER BOSCO: But "primarily engaged" is  
4 included in Mr. Dombrowksi's proposal.

5 COMMISSIONER DOMBROWSKI: It's included. And  
6 let me again cite, in the federal regs -- I don't have  
7 the language right in front of me, but it is -- it is  
8 "occasional," "infrequent," "unscheduled," I believe.

9 COMMISSIONER BROAD: Well, the difference -- the  
10 difference is that the bootstrapping isn't there.

11 COMMISSIONER BOSCO: And how about  
12 "noncumulative"?

13 COMMISSIONER BROAD: Well, I mean, it doesn't  
14 matter. The question is, if you spend 49 percent of your  
15 time doing nonexempt work, and 5 percent of your time  
16 doing occasional duties, and 2 percent of your time doing  
17 this or that, and you get to 53 percent with those  
18 things, or 52 percent, under Mr. Dombrowski's proposal  
19 you're still exempt. And that violates the law.

20 MR. RANKIN: That is the problem with importing  
21 the federal stuff here, because the federal standard, the  
22 basic standard, is different. It is not "primarily  
23 engaged in." It's a primary duties test. And by trying  
24 to mix the two, you cause a problem.



1           COMMISSIONER BOSCO:  Isn't there a way of saying  
2   that in meeting the 50 percent, you can't use the  
3   occasional time?

4           COMMISSIONER DOMBROWSKI:  The problem, Doug --  
5   the problem is -- and let me go back and read the  
6   "occasional" test, because it's related to the "directly  
7   and closely related," which is what I'm trying to get at  
8   here.

9           "In addition to the type of work which, by its  
10   very nature, is readily identifiable as being  
11   directly and closely related to the performance  
12   of the supervisory and management duties, there  
13   is another type of work which may be considered  
14   directly and closely related to the performance  
15   of these duties.  In many establishments, the  
16   proper management of a department requires the  
17   performance of a variety of occasional,  
18   infrequently recurring tasks which can not  
19   practicably be performed by the production  
20   workers and are usually performed by the  
21   executive.  These small tasks, when viewed  
22   separately without regard to their relationship  
23   to the executive's overall functions, might  
24   appear to constitute nonexempt work.  In

1 reality, they are the means of properly carrying  
2 out the employee's management functions and  
3 responsibilities in connection with men,  
4 materiel, and production."

5 COMMISSIONER BROAD: Well, Mr. Bosco, I think it  
6 would be appropriate to say that occasional nonexempt  
7 duties can't be counted towards exempt duties. I think  
8 that would be fine. That -- and I think that would be  
9 appropriate, if we wanted to do that. I just think it's  
10 simpler to say whatever you do that's nonexempt, it can't  
11 get over 50 percent. It's a much simpler -- it's a much  
12 simpler way of doing it, because what you're saying is  
13 that there are closely related duties, and those are the  
14 instrumentalities to carry out the job. In other words,  
15 typing your managerial report into your personal computer  
16 rather than handing a draft of it to a secretary clearly,  
17 under current California law, under what is proposed in  
18 Mr. Dombrowski's and what is proposed in mine, those are  
19 exempt duties.

20 It's this additional class that isn't closely  
21 related, isn't an instrumentality, is the sweeping up of  
22 broken glass, a janitorial function, is the -- you know,  
23 you heard the term "filling in." It's -- and that's what  
24 this is really about. I mean, let's get down to it.

1 What this is really about is the person in these retail  
2 establishments that's called an assistant manager that  
3 works there with -- alone or one or two people, and when  
4 somebody -- and we had them testify here on one of the  
5 previous iterations of this thing that when somebody's  
6 absent, one of the line workers is absent, they go fill  
7 in for them. And that's their job, to run the cash  
8 register. As Mr. Young said, when Christmas season comes  
9 and they don't want to hire extra work, it's the person  
10 who runs the cash register for, actually, 40 hours a week  
11 during Christmas. It's -- it's those people. That's  
12 what all the litigation about -- is about here, and  
13 that's what all the enforcement actions of DLSE are  
14 about, and that's what all -- this is not about class  
15 action suits and lawyers. It's about ordinary workers  
16 going to the DLSE with their claims, to try to get their  
17 overtime.

18           It's not about chief financial officers, it's  
19 not about CEO's that go and, you know, type something for  
20 five minutes. It's about that middle class of  
21 supervisors, lead persons, quote-unquote, "working  
22 managers" who are earning the princely sum of \$1900 a  
23 month and are working 60, 70, 80 hours a week and who --  
24 they want to figure out some way to muck up the law, make

1 it vague, make it unclear, cause a whole big litigation  
2 problem, so that they can reclassify those workers.  
3 That's what this is about, and that's the essential  
4 difference between Mr. Dombrowski's proposal and mine.

5 (Applause)

6 COMMISSIONER DOMBROWSKI: And I, again,  
7 respectfully disagree. All I'm trying to do is get some  
8 conformity on the duties, which is what we were starting  
9 out this.

10 COMMISSIONER BROAD: Mr. Chairman, what I'd like  
11 to ask at this point, if we're done with the testimony,  
12 is --

13 MR. RANKIN: We have one more.

14 COMMISSIONER BROAD: Oh, okay.

15 MR. JOHNSON: Well, it's an honor and a  
16 privilege to participate in this intellectual discussion.

17 (Laughter)

18 COMMISSIONER DOMBROWSKI: Give your name and  
19 organization.

20 MR. JOHNSON: And when the word Macy's was  
21 mentioned, of course, it touched the memory button in my  
22 brain, if there is such a thing.

23 MR. RANKIN: Walter Johnson. This is Walter  
24 Johnson, the executive secretary-treasurer of the San

1     Francisco Labor Council.

2                   MR. JOHNSON:  Oh.  I was so excited about  
3     participating, I forgot to say who I was.

4                   (Laughter and applause)

5                   MR. JOHNSON:  And as I was saying before I was  
6     interrupted --

7                   (Laughter)

8                   MR. JOHNSON:  -- that the Macy word, of course -  
9     - for about 27 years, I represented people working at  
10    Macy's, and I very well understand all of this discussion  
11    about an executive.  And, in fact, if I knew it was  
12    taking place today in this manner, I would have brought  
13    up my great brilliant piece I wrote on that subject  
14    several years ago.  But I will be -- make sure that you  
15    get copies of it in there.

16                   The real thing goes back in here, number one --  
17    and I'm not an attorney, so I'll be brief -- and that is  
18    --

19                   (Laughter)

20                   MR. JOHNSON:  -- in this situation, the real  
21    thing involved in this is a definition of words, and  
22    involved in this -- and as Humpty-Dumpty said -- and I  
23    wasn't there when he said it, but he said, "A word is  
24    what I choose it to mean, nothing more or nothing less.

1 When I say 'nice,' it means what I mean it to be." And  
2 that is the trouble with the word "executive." People  
3 try to define "executive" in a convenient manner and that  
4 can be used in a situation that becomes an obstruction to  
5 the employee's right to have overtime. And it isn't just  
6 overtime over 8 hours or something like that. It's  
7 overtime at night, when they get the premium pay, and  
8 different things of that nature that are involved,  
9 because it is an abuse of the employees' basic rights to  
10 perform their duties and to be paid and compensated on a  
11 basis that is appropriate with what they were told they  
12 were going to get when they got there and what --  
13 fortunately, we have contracts in San Francisco that  
14 takes care of that. But you still have to get involved  
15 in that whole situation.

16 So, I think what you need to do -- and I could  
17 give you records of this -- to realize what is the  
18 definition of "executive" and what is the definition of  
19 "casual" and all of that, so that you get down to the  
20 issue. And as Mr. Broad has very -- pointed out in a  
21 very clear and concise manner, we're talking about making  
22 sure something's in there in a clear manner that the  
23 workers can understand too what their rights are.

24 That's what we're talking about here, because

1 what really has bothered me -- and I might take another  
2 minute or two, although Pulaski gave me a look in there -  
3 - what really has bothered me in attending these meetings  
4 is the separation of people within our society. A little  
5 while ago, we were talking about up in the snow country,  
6 which I thought, in my own words, was a snow job. But --

7 (Laughter)

8 MR. JOHNSON: -- they get involved in this  
9 situation here, and they separate the people out and say,  
10 "Well, they're this and they're this," and they're all  
11 people. And this is what your responsibility is when  
12 you're looking here, is not to try to manipulate the  
13 language and the words, but to say how are we going to  
14 take care of those people so they'll have a life that has  
15 some meaning. That is the basic reason for your being on  
16 this Commission.

17 (Applause)

18 MR. PULASKI: Mr. Chairman, final -- final  
19 words.

20 MR. JOHNSON: Let me go on.

21 COMMISSIONER DOMBROWSKI: Mr. Pulaski.

22 MR. PULASKI: Final words.

23 COMMISSIONER DOMBROWSKI: All right.

24 MR. JOHNSON: I'm not through yet.

1 (Laughter)

2 MR. JOHNSON: Excuse me, Art. I'm not through  
3 yet.

4 But the final thing is in here, that we have  
5 this basic responsibility. And they bring up 7-11,  
6 Burger King. But from my point of view, the Burger King  
7 idea does not get to the meat of the problem.

8 (Laughter)

9 MR. JOHNSON: We have to get down to the issues.  
10 And I'll be very happy to provide you with more  
11 information because I've fought the battle of executives  
12 for years. And I appreciate the fact of Mr. Broad  
13 bringing this to the point -- and bringing it to this  
14 point so it's understandable.

15 And I could go on more, but I'm not going to  
16 because I don't want to sound like a lawyer. And again,  
17 many thanks for being here. Thank you all for the time  
18 you're putting in. And, of course, let us hope it all  
19 comes out to suit my particular opinion.

20 Thank you.

21 (Laughter and applause)

22 MR. PULASKI: Final comments. The language of  
23 this proposal before us imports and imposes federal  
24 language that is weaker than the language that we have



1 utilized in this state in the past. It diminishes the  
2 impact, it weakens the language, and it weakens the  
3 intent of AB 60.

4 This proposal -- and I would suggest that you  
5 give equal discussion opportunity, which I have not heard  
6 today, to the alternative proposal by Commissioner Broad,  
7 because I consider, in the final words on behalf of  
8 workers of California, the proposal before us that you  
9 have debated is a hostile proposal to the intentions of  
10 the law and the promise of the Governor. And therefore,  
11 you ought to examine -- turn this down vigorously and  
12 examine the proposal by Commissioner Broad, which is not  
13 hostile to the intent of legislation and the promise of  
14 our Governor.

15 Thank you.

16 (Applause)

17 COMMISSIONER BROAD: Mr. Chairman, I think at  
18 this time it would be appropriate for the Attorney  
19 General to address the legality of your proposal and  
20 whether the Attorney General's Office believes that it is  
21 appropriate and legally defensible under our statutory  
22 obligations.

23 MS. STRICKLIN: Mr. Broad and commissioners,  
24 that would be -- a categorical response to whether or not

1 this is legal, I don't think I can give. I can give  
2 point by point on certain aspects of the proposal. Is  
3 that what you're requesting?

4 COMMISSIONER BROAD: Yes. That's fine. Thank  
5 you.

6 MS. STRICKLIN: Okay. The one point that's been  
7 discussed is the regulation 541.110. That's the  
8 "occasional" test, and that's one of the things that I  
9 would be concerned about. I don't think I can give you a  
10 definitive answer as to whether or not that would comply  
11 with AB 60 because it would depend on what task you're  
12 talking about. That regulation reads that an occasional  
13 task could very well be a directly and closely related  
14 task. In that sense, I think everyone agrees that, yes,  
15 then that particular occasional task would be something  
16 that would be considered exempt. The concern I have,  
17 though, is -- with that is that, on the other hand,  
18 occasional tasks would be way on the far side of what  
19 might be considered exempt. And the closer you get to  
20 that, you're going towards a federal standard that's a  
21 primary duties standard. And it's not a clear definition  
22 of what -- way of defining a duty. A court might very  
23 well look at that and say, "This is too vague," and for  
24 that reason throw out this portion of the regulation

1   because it's hard to enforce.

2                   It might make sense -- one way you could handle  
3   that might be to put something more definitive in the  
4   Statement as to the Basis as to what you're actually  
5   talking about in terms of occasional tasks. But this is  
6   not really so descriptive as to determine whether or not  
7   it would be in compliance with AB 60 or not.

8                   COMMISSIONER DOMBROWSKI: And let me just  
9   interject. I have no problem whatsoever with putting  
10   something into the Statement as to Basis that makes it  
11   clear that we are looking at these occasional tasks tied  
12   to "closely and directly related."

13                  COMMISSIONER BROAD: Well, my question is, if  
14   the occasional task is a nonexempt duty, in other words,  
15   occasional task goes to time that you spend doing  
16   something, and then you call it a closely related duty,  
17   and then you call it an exempt duty, but the actual  
18   activity that you're looking at would otherwise be  
19   nonexempt.

20                  MS. STRICKLIN: Well --

21                  COMMISSIONER BROAD: The question is, if you do  
22   those activities, occasional activities, which, if  
23   performed at any other time, are nonexempt, and you do  
24   that in combination of other nonexempt activities more

1    than 50 percent of the time, do you not violate Labor  
2    Code Section 515?

3                   MS. STRICKLIN:   That's hard to answer in a  
4    vacuum because the occasional task, if it's directly and  
5    closely related -- the example given, of typing of the  
6    report -- yes, that would be exempt.   And that's --  
7    that's what --

8                   COMMISSIONER BROAD:   No, no.   My question is, if  
9    it's not -- if it's not typing a report, if it's sweeping  
10   the floor.

11                  MS. STRICKLIN:   Well, I can tell you that I did  
12   some legal research too, and there's not any case that I  
13   also found out there that would -- that describes what  
14   this actually means in the real world.   And so, it very  
15   well might, yes, violate 515.

16                  COMMISSIONER DOMBROWSKI:   Why is there not any  
17   case history?

18                  MS. STRICKLIN:   I don't have an answer to that.

19                  COMMISSIONER DOMBROWSKI:   Is it because -- is it  
20   because no one's ever challenged it, no one's ever used  
21   it?

22                  MS. STRICKLIN:   I would have no way of knowing  
23   that.

24                  COMMISSIONER DOMBROWSKI:   You don't know

1 anything.

2 MS. STRICKLIN: No.

3 COMMISSIONER BOSCO: Is there some way -- oh, go  
4 ahead. I'm sorry.

5 COMMISSIONER COLEMAN: Wouldn't it be true, if  
6 these nonexempt duties were performed more than 50  
7 percent of the time, that the California statute takes  
8 care of that? Correct? If they're performing nonexempt  
9 duties more than 50 percent of the time, they're  
10 nonexempt.

11 MS. STRICKLIN: That's true. That's true.

12 COMMISSIONER COLEMAN: That's sort of the safety  
13 net, if you will, to ensuring that indeed the person is  
14 nonexempt as opposed to a manager.

15 MS. STRICKLIN: The problem is, when you're  
16 talking about an occasional task, I think it's a vague  
17 area. Is it exempt or isn't it exempt? Is it directly  
18 and closely related? Then, yes, it would be exempt.  
19 It's hard to -- I think the question comes up as to  
20 whether or not it would be a violation of 515(a) or not  
21 because the occasional task, in a vacuum, is hard to  
22 describe. I'm still looking for an example, really, of  
23 what an occasional task would necessarily be. If you're  
24 going to go -- take a monthly period and go back and look

1 to see what one employee has done over that time, and  
2 there were some occasional tasks in there, it would be  
3 easy to decide whether or not you satisfied 515(a). But  
4 prospectively, how do you know what something -- is  
5 something exempt or nonexempt if it's an occasional task?  
6 I mean, how do you determine that?

7 COMMISSIONER BROAD: Well, I guess the question  
8 would be along Ms. Coleman's line, that if, you know, we  
9 put something in there that in no event shall an  
10 occasional task, in combination with any other duties  
11 that are -- that could be characterized as nonexempt, may  
12 it exceed more than half the employee's work time.

13 COMMISSIONER BOSCO: Well, or that --

14 COMMISSIONER COLEMAN: Isn't that what the  
15 statute says? I mean, does that --

16 COMMISSIONER BOSCO: Or that occasional tasks  
17 may not accumulate to the point of --

18 COMMISSIONER BROAD: They don't count.

19 COMMISSIONER BOSCO: Right. Yeah, basically  
20 that they don't count in considering whether someone is  
21 50 percent nonexempt.

22 COMMISSIONER DOMBROWSKI: The only -- the only  
23 risk you'd have there is, because we're looking at this  
24 as part of the "closely and directly related," and I --

1 when we -- the point is, when we get to some court case  
2 down the road, if somebody's looking at this, I want it  
3 clear that we were looking at "closely and directly  
4 related" and looking at occasional tasks as part of that  
5 "closely and directly related."

6 COMMISSIONER BOSCO: Well, can't we do that in  
7 the Statement of the Basis?

8 COMMISSIONER DOMBROWSKI: That's what I'm  
9 proposing we do in the Statement of Basis.

10 COMMISSIONER BROAD: Well, I don't understand  
11 what that means. That doesn't -- I don't -- I don't see  
12 what that means.

13 The question is, are we saying yes or no, that  
14 occasional tasks which could not -- which are activities  
15 that are not considered exempt duties, along with exempt  
16 -- with other nonexempt duties, can add up to more than  
17 50 percent of the employee's time? Yes or no?

18 COMMISSIONER DOMBROWSKI: If they're directly  
19 and closely related.

20 COMMISSIONER BROAD: They can.

21 COMMISSIONER DOMBROWSKI: They would be able to.

22 COMMISSIONER BROAD: They would be able to. So  
23 you can --

24 COMMISSIONER DOMBROWSKI: But you can't have --

1 COMMISSIONER BROAD: Okay. So --

2 COMMISSIONER DOMBROWSKI: But by definition, you  
3 cannot have an occasional task be more than an occasion.  
4 It can't --

5 COMMISSIONER BROAD: I don't care how many  
6 occasions it is. If it adds up to 52 percent and you can  
7 characterize it as a nonexempt duty, it violates the  
8 statute on its face. I don't care what we say in the  
9 Statement of Basis.

10 COMMISSIONER DOMBROWSKI: Closely and directly  
11 related. And you go back to the language in there. It's  
12 managerial --

13 COMMISSIONER BROAD: Well, what you're saying  
14 is, you define it as closely and directly related, and  
15 therefore it automatically becomes exempt. And that's a  
16 presumption of exemption. It's all -- it's the primary  
17 duties test --

18 COMMISSIONER DOMBROWSKI: No, it isn't.

19 COMMISSIONER BROAD: -- backed right into --

20 COMMISSIONER DOMBROWSKI: No.

21 COMMISSIONER BROAD: And it's where we've been  
22 this entire time with this proposal. It is the guts of  
23 the problem.

24 COMMISSIONER DOMBROWSKI: Marguerite, do you



1 have other comments?

2 MS. STRICKLIN: That is -- that is a danger with  
3 the occasional task, yes. You could get there.

4 (Applause)

5 MS. STRICKLIN: But to say that -- outright  
6 whether it does or doesn't violate 515 is hard to say in  
7 a vacuum. You know, it's going to come out in a factual  
8 situation before a court, depending on what the task is.  
9 And the question is whether the IWC wants to -- wants to  
10 make a policy decision that it will allow -- it would  
11 allow the court to make that decision or whether --

12 COMMISSIONER BROAD: Right, whether we want to  
13 take a flyer on this one.

14 COMMISSIONER DOMBROWSKI: No, that's not --  
15 Barry, that's not -- what I'm proposing is the conformity  
16 on federal. And we're arguing about "closely and  
17 directly," we're arguing about "occasional."

18 COMMISSIONER BROAD: I --

19 COMMISSIONER DOMBROWSKI: If we don't adopt it  
20 with that intention, it doesn't get challenged in a court  
21 of law ever anyway. I mean, it's a decision we then make  
22 as a policy. But as a policy matter, I think we have the  
23 obligation to do it. And if someone is going to abuse  
24 it, I am sure that the lawyers here and lawyers around

1 the state are going to find those employers very quickly  
2 and take them to court.

3 (Audience murmuring)

4 COMMISSIONER BROAD: So what you're saying is --  
5 so what you're -- so what you concede, Mr. Chairman, is  
6 that your proposal invites litigation. That is the  
7 intent of it.

8 (Applause and cheering)

9 COMMISSIONER DOMBROWSKI: No. No, I am not. I  
10 am saying my proposal is trying to develop some duty  
11 conformity. Whether it brings litigation is going to be  
12 up to the situations and the specific facts.

13 COMMISSIONER BROAD: Okay. Mr. Chairman, what  
14 I'd like, with your indulgence, is to explain the  
15 difference between your proposal and my proposal, and  
16 then I think we should go to a vote.

17 COMMISSIONER DOMBROWSKI: Okay.

18 COMMISSIONER BROAD: My proposal and your  
19 proposal, as Ms. Thompson pointed out, a significant  
20 number of changes were made in your proposal over the  
21 last 24 hours as we intended to reach some resolution of  
22 this, and a whole lot of stuff dropped out before this  
23 morning since yesterday. And I'm very pleased about that  
24 or my proposal would differ from yours, actually, in more

1     than just a couple of places.

2             Let me just enumerate the differences, and they  
3     are few but significant.

4             First, in all three exemptions, it starts out by  
5     saying you must be primarily engaged in the duties which  
6     are set forth.

7             Second, in the executive exemption, it does not  
8     drop the exiting requirement in California law that  
9     someone exercises discretion and independent judgment.  
10    It does not go to the undefined term, just "discretionary  
11    powers."

12            Third, it eliminates the verbiage in the  
13    executive description coming out of *Ramirez*, or allegedly  
14    coming out of *Ramirez*, and the sort of words surrounding  
15    that that really have no place, in my view.

16            And it restores to the professional exemption  
17    our traditional view that, without examining the duties -  
18    - and this is actually very clear for -- it's really a  
19    very clear rule -- without examining duties, that someone  
20    who is licensed by the -- or certified by the State of  
21    California and is primarily engaged in certain enumerated  
22    professions are exempt.

23            And then it adds the learned -- it adds the  
24    language from the federal rules with regard to defining

1 the learned and artistic exemption.

2 COMMISSIONER DOMBROWSKI: But I agreed to amend  
3 my professional to reflect that.

4 COMMISSIONER BROAD: Okay. So, in other words,  
5 your professional will look like my professional.

6 COMMISSIONER DOMBROWSKI: Right.

7 COMMISSIONER BROAD: Okay. So, those are the  
8 differences, and those are the only differences.

9 It does include and clarifies that we are  
10 talking about directly and closely related activities.  
11 And as we've discussed, it's a rather clear rule, I  
12 think, what those kind of activities are. Those are  
13 instrumentalities that are necessary to carry out an  
14 exempt activity, typing the report, faxing something that  
15 you've just drafted, and so forth.

16 The differences are, in my view, narrow but very  
17 significant. And the difference is between something  
18 that invites litigation, causes an enormous amount of  
19 controversy, is removed, and we get to something that  
20 provides employers and employees clarity.

21 Now what I would like to commend you and your  
22 attorney on is -- and what I believe is appropriate and  
23 what I think is good about what you've done and what my  
24 work product does -- and that is it actually sets out a

1 definition, for the first time, of what an administrator,  
2 an executive, or a professional. We have had, since  
3 1947, in our wage orders a description that has been  
4 interpreted but is not set out. And so this, I think, is  
5 an advantage that is worth considering, although I am  
6 perfectly pleased to just leave the wage orders exactly  
7 as they are with regard to the administrative, executive,  
8 and professional exemption. There's no particular reason  
9 to change it, because it is very settled law in this area  
10 in California. And I believe the legislative history of  
11 AB 60 would show that Section 515 was intended to codify  
12 the IWC's regulations in this area as they have evolved  
13 and been interpreted by the courts.

14           So, I would respectfully suggest that my fellow  
15 commissioners embrace my proposal. I believe that it's  
16 an appropriate compromise between Mr. Dombrowski's  
17 position that bridges the gap between the desire for  
18 employers for conformity of the federal -- with federal  
19 rules as they've been interpreted and working people's  
20 desire not to be exploited.

21           Thank you.

22           COMMISSIONER DOMBROWSKI: Without further  
23 comment, I'm going to make a motion for the commissioners  
24 to adopt my proposal as amended. Can I ask for a second?

1 COMMISSIONER COLEMAN: Second.

2 COMMISSIONER DOMBROWSKI: Call the roll.

3 MR. BARON: Dombrowski.

4 COMMISSIONER DOMBROWSKI: Aye.

5 MR. BARON: Bosco.

6 COMMISSIONER BOSCO: Aye.

7 (Audience murmuring)

8 MR. BARON: Broad.

9 COMMISSIONER BROAD: No.

10 MR. BARON: Coleman.

11 COMMISSIONER COLEMAN: Aye.

12 MR. BARON: Rose.

13 COMMISSIONER ROSE: No.

14 (Audience murmuring)

15 COMMISSIONER DOMBROWSKI: We'll move to Item 9,

16 consideration of summaries and Statements as to the Basis

17 for the wage orders reflecting Commission actions.

18 Mr. Baron.

19 MR. BARON: Move that language.

20 COMMISSIONER DOMBROWSKI: Okay. I'm going to

21 make a motion we adopt the Item 9 language: "The IWC

22 directs the executive officer to finalize the Statement

23 as to the Basis and summary language in accordance with

24 the Commission's deliberations and regulations that have

1    been adopted.  The executive officer shall report on its  
2    completion to the Commission."

3                   Do I have a second?

4                   COMMISSIONER COLEMAN:  Second.

5                   COMMISSIONER DOMBROWSKI:  All in favor, say  
6    "aye."

7                   (Chorus of "ayes")

8                   COMMISSIONER DOMBROWSKI:  Anyone opposed?

9                   COMMISSIONER BROAD:  No.

10                  COMMISSIONER DOMBROWSKI:  Is that a "no" vote?

11                  COMMISSIONER BROAD:  That's a "no" vote.

12                  MR. BARON:  Item 10 is literally sitting in the  
13    notice.

14                  COMMISSIONER DOMBROWSKI:  Item 10 is  
15    consideration of whether to extend the provisions of  
16    Interim Wage Order 2000 to the effective date of  
17    proposals adopted at this hearing, pursuant to Labor  
18    Code.

19                  Explain this thing.

20                  MR. BARON:  This is pretty much the same  
21    language that we adopted at the end of the last hearing,  
22    basically saying that our actions will take effect in --  
23    no later than October 1, and that up until that point,  
24    that what is presently there continues in effect, other

1    than there were a few of the -- the references in here to  
2    (K), (L), (M), or (N) relate to some of the delineated  
3    occupations and industries, such as stables, skiing,  
4    fishing, outside sales, just to say that in any of those  
5    cases where we didn't act, that according to the terms of  
6    AB 60, that those don't continue after July 1. So that  
7    would be -- the exact language is literally sitting in  
8    your Item 10. And again, it's pretty much the same  
9    language that was adopted along with the actions the last  
10   time.

11               COMMISSIONER DOMBROWSKI: Do I have a motion?

12               COMMISSIONER BOSCO: So moved.

13               COMMISSIONER DOMBROWSKI: Second?

14               COMMISSIONER ROSE: Second.

15               COMMISSIONER DOMBROWSKI: All in favor, say

16   "aye."

17               (Chorus of "ayes")

18               COMMISSIONER DOMBROWSKI: Any opposed?

19               (No response)

20               COMMISSIONER DOMBROWSKI: Adopted.

21               Any other business before the Commission?

22               Do we have a move to adjourn?

23               COMMISSIONER BOSCO: So moved.

24               COMMISSIONER DOMBROWSKI: Second?



1 MS. M. THOMPSON: (Not using microphone) Wait,  
2 please!

3 COMMISSIONER DOMBROWSKI: I'm sorry.

4 MS. M. THOMPSON: (Not using microphone) I just  
5 had a few things.

6 COMMISSIONER DOMBROWSKI: Come up, please.

7 MS. M. THOMPSON: My name is Mary Lou Thompson.  
8 I'm an attorney with Littler Mendelson.

9 COMMISSIONER DOMBROWSKI: Wait. Turn your  
10 microphone on.

11 MS. M. THOMPSON: I'm Mary Lou Thompson. I'm an  
12 attorney with Littler Mendelson.

13 I'm here representing the Turlock and Modesto  
14 irrigation districts with regard to an issue as to Wage  
15 Order 14. This is one wage order which does not include  
16 the standard exclusion of public employees that is  
17 contained in the rest of the wage orders. Everything  
18 that we know about it indicates that that was an  
19 oversight. And since you now are looking at the wage  
20 orders and adopting changes to them, we would ask that  
21 you clarify that Wage Order 14 was not -- is not intended  
22 to cover public employees, employees of special  
23 districts, municipal corporations.

24 MR. BARON: I guess that my -- the chair asked

1 me to respond. AB 60 pointedly says that the one area in  
2 Order -- the only area in Order 14 that can -- that  
3 allows us to engage in, let's say, an AB 60 process is  
4 just the issue of penalties, that, you know, anything  
5 else relative to Order 14 could not be done under this  
6 expedited process and would have to be done under a wage  
7 board process. And I must say that there was nothing --  
8 you know, there's been no discussion of the Commission on  
9 this particular issue.

10 We can certainly, in the future, schedule a  
11 discussion of this issue. But I think, at this point in  
12 time, I don't think it would be -- my opinion -- I don't  
13 think it would be appropriate for the -- for the  
14 Commission to take such an action here today.

15 MS. M. THOMPSON: Okay. But I think my clients  
16 would be happy if you put it on the schedule to consider.

17 MR. BARON: Okay.

18 COMMISSIONER DOMBROWSKI: Commissioner Broad?

19 COMMISSIONER BROAD: I just -- just a quick  
20 question. These are farm workers who work for irrigation  
21 districts?

22 MS. M. THOMPSON: No, these -- these are the  
23 irrigation districts.

24 COMMISSIONER BROAD: I know, but who are the

1 employees you're talking about here that were -- that are  
2 somehow --

3 MS. M. THOMPSON: Well, there's a federal judge  
4 in Fresno who said that the employees who are involved in  
5 opening and closing the irrigation district's ditches  
6 that go through the fields that irrigate with the water  
7 provided by the irrigation district and who are employees  
8 of the district are agricultural employees who may be  
9 covered by Wage Order 14.

10 COMMISSIONER BROAD: So they get -- so, the  
11 irrigation districts don't want to pay them daily  
12 overtime? Is that the basic issue?

13 MS. M. THOMPSON: Correct. They're covered --  
14 they're covered by collective bargaining -- memoranda of  
15 understanding, which give them overtime after 40 hours in  
16 a workweek, which is more generous than Wage Order 14  
17 provides. But this -- the Turlock Water District was  
18 created in 1887. They have a long history of operating  
19 outside the boundaries of and uncovered by Wage Order 14.  
20 And consistently, the DLSE has said, "No, you're not; it  
21 is not the intention of the Industrial Welfare  
22 Commission." So, I would like you to make sure that your  
23 intention is clear. And my client would too.

24 COMMISSIONER DOMBROWSKI: Thank you.

1 Any other comments?

2 COMMISSIONER BOSCO: I feel sorry for that poor  
3 lady if she had to sit through everything that came  
4 before this, just to --

5 MS. M. THOMPSON: Thank you.

6 MR. RANKIN: Well, I'd just like to comment on  
7 this. If the employees indeed are covered by a  
8 collective bargaining agreement, I don't know why there's  
9 any problem at all. They're exempt anyway. And we  
10 always have to remember that one of the reasons employers  
11 who are covered by collective bargaining agreements don't  
12 like the Industrial Welfare Commission wage orders is  
13 because when those collective bargaining agreements  
14 expire and the employees may be on strike, under the  
15 Industrial Welfare Commission wage orders, they are  
16 obligated to continue to pay overtime.

17 COMMISSIONER DOMBROWSKI: Okay.

18 Did I hear a motion to adjourn?

19 COMMISSIONER ROSE: Yes, you did.

20 COMMISSIONER DOMBROWSKI: Did I hear a second?

21 COMMISSIONER ROSE: Yes, you did.

22 COMMISSIONER DOMBROWSKI: All in favor, say  
23 "aye."

24 (Chorus of "ayes")

1 COMMISSIONER DOMBROWSKI: All opposed?

2 (No response)

3 COMMISSIONER DOMBROWSKI: Thank you. We are  
4 adjourned.

5 (Thereupon, at 2:26 p.m., the public  
6 hearing was adjourned.)

7 --o0o--

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9

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11

12 CERTIFICATE OF REPORTER/TRANSCRIBER

13 --o0o--

14 I, Cynthia M. Judy, a duly designated  
15 transcriber, do hereby declare and certify under penalty  
16 of perjury under the laws of the State of California that  
17 I transcribed the three tapes recorded at the Public  
18 Hearing of the Industrial Welfare Commission, held on  
19 June 30, 2000, in Sacramento, California, and that the  
20 foregoing pages constitute a true, accurate, and complete  
21 transcription of the aforementioned tapes, to the best of  
22 my ability.

23

24 Dated: July 7, 2000

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CYNTHIA M. JUDY

Reporter/Transcriber